IRREGULARITIES IN THE CRIMINAL PROCEDURE CODE OF NORTHERN STATES OF NIGERIA:- A CRITICAL APPRAISAL.

BY

IDRISU IBRAHIM ISMAILA

FEBRUARY, 1999.

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A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M).

FEBRUARY, 1999.

DECLARATION

I, IDRISU IBRAHIM ISMAILA, do hereby declare that this thesis has been prepared by me under the supervision of Dr. Bashir Yusuf Ibrahim, Department of Public Law, Ahmadu Bello University, Zaria. It is the result of my independent research and no part of it has been published or presented for the award of higher degree.

IDRISU IBRAHIM ISMAILA **DATE: February, 1999**

DEDICATION

This thesis is dedicated to my father Alhaji Ibrahim Ismaila who took the first and vital step towards my education, and to my mother Hajiya Binta Ibrahim Ismaila for her prayers and blessings.

CERTIFICATION

This thesis entitled **"IRREGULARITIES IN THE CRIMINAL PROCEDURE CODE OF THE NORTHERN STATES OF NIGERIA:- A CRITICAL APPRAISAL" by IDRISU IBRAHIM ISMAILA** meets the regulation governing the award of the Degree of LL.M of Ahmadu Bello University and is approved for it's contribution to knowledge and literary presentation.

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ABSTRACTS

This thesis gives an account of the Law and Irregularities in the Criminal Procedure Code of the Northern States of Nigeria. Most of the irregularities were found to have been committed by the courts of inferior records, most especially the Area Courts and Magistrates' Courts. The study was undertaken with a view to highlighting the irregularities that vitiate the proceedings of the courts and those that are inconsequential.

It is hoped that this study will be of use to all those involved in the trial in the inferior courts in Nigeria. It may also benefit those members of the general public who are interested in knowing as to whether every irregularity or error in proceedings, that justifies the reversal of a judgment or not.

Chapter 1 deals with the general introduction, meaning of criminal procedure, objective of research and the definition and effect of irregularity in a criminal proceeding.

Chapter 2 examines classification of irregularities namely, mere and fundamental irregularities in the Criminal Procedure Code of the Northern States of Nigeria and fundamental irregularities under the 1979 constitution.

Chapter 3 examines irregularities in Arrest and Search, namely,. Definition of Arrest, Constitutional Provision for Arrest, Ground of Arrest, Manner of Arrest, Arrest with or without Warrant, Person who can Effect

Arrest, Effect of Irregularities in Arrest, Remedies Available to illegally arrested person. It also discusses extensively irregularities in search and seizure, namely, search with warrant wrongly obtained, search without warrant, search under a valid warrant but in an unlawful manner, search of person upon Arrest, Search of Premises, Rules Relating to Search and Effect of Irregularities in Search.

Chapter 4 analyses irregularities in trial, namely production of the accused person and evidence before the court. It also evaluates irregularities in a charge, namely, definition of a charge, formal charge, Informal Charge and effect of Irregularities in the charge.

Chapter 5 considers irregularities in Judgement and sentence, namely, Nature of Judgement, Judgement and Failure of Justice test, effect of irregularities in Judgement. It also discuss the irregularity in sentencing, namely, definition of sentencing, limitation on sentencing powers and some procedural factors considered in sentencing.

Chapter 6 draws certain summary and conclusions from the study and offers some suggestions as guide to courts and law enforcement agents against committing further irregularities in criminal trials.

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ABBREVIATIONS

AII NLR	-	All Nigerian Law Reports
AG Fed	-	Attorney General Federal
AIR	-	All Indian Law Reporter
AC	-	Appeal Cases (England)
AII ER	-	All England Law Reports
COP	-	Commissioner of Police
CLR	-	Constitutional Law Report (Nigeria)
CA	-	Criminal Appeal
ER	-	English Reports
ENLR	-	Eastern Nigeria Law Reports
FCA	-	Federal Court of Appeal (Nigeria)
FSC	-	Federal Supreme Court
IMB	-	International Merchant Bank
IGP	-	Inspector General of Police
ILR	-	Indian Law Reports
LRN	-	Law Reports of Nigeria
LLR	-	Law Reports of the High Court of Lagos.
NLR	-	Nigerian Law Reports
NSCC	-	Nigerian Supreme Court Cases
NWLR	-	Nigerian Weekly Law Reports
NA	-	Native Authority
NCLR	-	Nigerian Constitutional Law Reports
NRNLR	-	Northern Region of Nigeria Law Reports
NCR	-	Nigerian Constitutional Reports
NMLR	-	Nigerian Monthly Law Reports
PLR	-	Plateau Law Reports
QBD	-	Queen Bench Division (England)
QB	-	Queen Bench Reports (England)
SC	-	Supreme Court Reports (Nigeria)
SCNJ	-	Supreme Court of Nigerian Journals
SLJR	-	Sudan Law Journal Reports
US (Ed)	-	United States (Editions)
WLR	-	Weekly Law Reports (England)
WRNLR	-	Western Region of Nigeria Law Reports
WACA	-	West African Court of Appeal Reports

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Meaning of Criminal Procedure

The term criminal procedure is difficult to define. All the same an attempt will be made to define criminal and procedure separately. Thus, the word "criminal" is derived from the word crime. The word crime is synonymous with the word offence,[1] both of which are interchangeable. A crime is an act of omission or commission which under any written law is deemed to be a crime, thus attracting punishment. The word "procedure" means the prescribed method - governing certain processes. For example, provisions are provided in the criminal procedure code that, before an accused is arrested the person making the arrest must comply with the conditions laid down in the code, otherwise the arrest may be declared unlawful.[2]

Criminal procedure, therefore is a method laid down by a law for bringing a person who is alleged to have

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[1] Attorney General V. Awoyele (1952) 19NLR52. See also Karibi-Whyte, A.G. (1986) Ground work of Nigerian Criminal Law. Nigerian Law Publication Ltd Lagos, pp.76-77.

[2] See Section 26, 27 and 28 of the Criminal Procedure Code, Cap 30 Laws of Northern Nigeria 1963, Vol.II.

committed a crime before a court of law for trial. It also deals with the method to be adopted by the court of trial, the right of appeal etcetera and deals with the rules governing the procedure in appellate courts. The code is one designed to make provision for procedure to be followed in criminal cases in the High courts and Magistrate Courts.[3]

1.2 Objective of the Research

The objective of this thesis is to examine the form and effects of irregularities in the criminal procedure code of the Northern States of Nigeria.

The present study seeks to ascertain the observance of criminal processes as required by the C.P.C. and is necessary to examine, as to whether every error, irregularity or omission during the trial can be regarded as fundamental and therefore occasions a failure of justice.[4]

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[3] See MAJEKODUNMI v. Shell Company of Nigeria Ltd. (1968)1 AII NLR 93 at 96

[4] See sections 379 and 380 of Criminal Procedure Code.

On the issues of these irregularities, during the proceedings in our Judicial System. Nnaemeka, Agu J.S.C in the case of MICHEAL OKARAH V. THE STATES[5] has rightly stated thus:-

> ".... Criminal Justice on our courts is a matter of substance and not one to be achieved by striking around for any tenuous twig of irregularity or technicality."[6]

At this juncture it is significant to pause for a moment and examine what amount to irregularities.

1.3 Definition and Effect of Irregularity in a Criminal Proceeding

An irregularity is defined as:-

> "The doing or not doing that, in the conduct of a suit at law, which conform with the practice of the court ought or ought not be done.[7]

The word "irregularity" has not been defined by the criminal procedure code. But in the context of the code

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[5] (1990) INWLR (PT.125) 128, See also IKE V. UGBOAJA (1993) 6 NWLR (PT. 295) 539 at 556.

[6] Ibid at 136

[7] See Henry, C.B. (1990) Black's Law Dictionary Six Edition West Publishing Co. U.S.A. p.829

it means, an omission or error of procedure in a criminal trial. The criminal procedure code dealt only with the effect of failure to comply with it's provisions in five Sections.[8] For example, Section 206 of the criminal procedure code provides:-

> "No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was infact misled by such error or omission and it has occasioned a failure of justice."

Thus, the fact that a charge did not disclose all the particulars of an offence, it will be regarded as a mere irregularity that will not lead to reversal of judgement on appeal, if it is shown that the accused was not misled. Section 47 of the High Court Laws of Northern Nigeria (Cap. 49) of 1963 provides:-

> On the hearing of any appeal against a conviction by a magistrate in a criminal case the court shall allow the appeal if it thinks that the

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[8] See Sections 206, 222, 288, 281 and Section 382 of the Criminal Procedure Code, cap 30 Laws of Northern Nigeria 1963, Vol.II.

judgement of the magistrate should be set aside on the ground that -

(a) it is unreasonable or cannot be supported having regard to the evidence, or

(b) the magistrate has made a wrong decision on any question of law, or

(c) there was a miscarriage of justice,

And in any other case shall dismiss the appeal, provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that - no substantial miscarriage of justice has actually occurred.

The above Section was applied by the Court of Appeal in dismissing an appeal grounded on a defective charge. In the case of ESSIEN V. COMMISSIONER OF POLICE.[9] At the Chief Magistrate's Court, Uyo, the appellants were charged with the offence of breach of the peace under Section 249(d) of the criminal code for blocking the

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[9] (1996) (PT.449) 5NWLR 489. See Mangal V. The State (1993) 3 NWLR (PT.279) 108.

entrance of the Church of Christ Premises, with stick and for planting plantain suckers in same. The ground of appeal is that, the charge sheet did not indicate that, the Church premises "is or being a public place." The appellants were represented by Counsel and no objection was raised to this, nor did the appellants say that, they were misled by the charge. At the trial, evidence was given by prosecution witness showing that, the appellants did the acts in question. The Chief Magistrate convicted and sentenced the appellants each to one month imprisonment "with hard labour." Their appeal to the High Court was dismissed, and dissatisfied further appealed to the court of appeal. It was held that, such an error in the charge was a mere irregularity that will not lead to reversal of judgement. S.206 of Criminal procedure code does not regard such as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Tobi, J.C.A. stated thus:-

> "If the accused persons, were in some confusion as to the real purpose of the charge, their counsel should have so indicated by way of objection. He did not do so. Counsel for the accused persons at the trial neither

> raised the issue during the case submission nor at final address. This clearly shows that, the appellants were not misled on the charge."[10]

From the foregoing provision it is explicit clear that an irregularity in criminal proceeding will not result in an appeal being allowed, unless the appellate court is satisfied that a miscarriage of justice has been occasioned.

Similarly, it still remain a mere irregularity where the lower court wrongly admitted evidence or that a technical error is committed in procedure, an appellate court interfere with the finding or sentence of the court, unless it is satisfied that a miscarriage of justice has occasioned. Thus section 288 of the criminal procedure code provides that:-

> A court exercising appellate jurisdiction shall not in the exercise of such jurisdiction interfere with the finding or sentence or other order of the lower court on the ground only that evidence has been wrongly admitted, or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such omission or irregularity.

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[10] Ibid at 500.

For example, when an accused person objects to the admissibility of confession, on the ground that the statement was not made voluntarily, it is for the Judge to decide the voluntariliness of the statement by conducting a trial within a trial. In the case of MICHEAL OKARAH V. THE STATE.[11] The appellant was convicted for culpable homicide punishable with death contrary to Section 221 of the Penal Code at the High Court. Jos. The deceased was an uncle of the appellant, both of them from the same town. The appellant demanded ₦6,650.00 from the deceased, which he had earlier given the deceased to keep for him. When the deceased failed to provide those monies, their relationship became badly strained, for which the appellant threatened to kill him. On the 15th February; 1983 the appellant carried the deceased on his motor-cycle to Miango Road, Jos on the pretext that, he was going to show, the deceased his business premisses. On their way, the appellants, had hired one Tanko Aliyu who attacked and kill the deceased with a knife. The appellant was subsequently charged and convicted for murder by the High Court. He thereupon appealed to Court of Appeal, which confirmed the decision of the High Court. Dissatisfied with that decision, the appellant appealed further to the Supreme Court, contending inter-alia, that a confessional statement allegedly made by him and relied on by the trial court was not properly admitted in evidence, the trial Judge should have allowed a trial within trial in order to authenticate the voluntariness or otherwise of the statement, and that the procedure whereby he was absent at an early stage of the proceedings when some exhibits were tendered against him

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[11] (1990) 1 NWLR (PT. 125) 128. *See also* Ijade V. Ogunyemi (1996)9 NWLR (PT. 470) 17 and Okoro V. State (1993) 3 NWLR (PT 282) 425.

by the prosecution was wrong and vitiated the trial. The court held that, an irregularity in procedure will be regarded as a mere irregularity that will not result in an appeal being allowed. Nnaemeka Agu J.S.C. stated thus:-

> "... Criminal Justice in our courts is a matter of substance and not one to be achieved by striking around for any tenuous twig or irregularity or technicality."[12]

When a trial is conducted in a manner different from that prescribed by the rule of procedure, the trial is bad and such irregularity cannot be cured. Thus the Privy Council in the case of SUBRAMANIAIYER V. KING.[13] where a person was tried for 41 separate offences in direct contravention of the provisions of S.234 of Indian Penal Code. their Lordships of the Privy Council observed that

> "No provision of the criminal procedure rule, can cure this irregularities in the trial. The procedure adopted by the trial court was one which the rule of procedure prohibited and have worked actual injustice to the accused."

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12 Ibid at 136

13 28 Indian Appeal 257 at 263 (PC).

CHAPTER TWO

CLASSIFICATION OF IRREGULARITIES

Basically there are two forms of irregularities, one is the mere irregularity which is trivial and not adverse to the judgement of a court, and secondly fundamental irregularity is considered so serious and is adverse to the judgment of court to make it void. Each of these irregularities will be discussed in detail hereunder.

2.1 Mere Irregularity

A mere irregularity may be defined as, mistake or omission done by a court in the course of Judicial proceeding, which are or is not of adverse nature and may not have any effect on the decision of the court. Section 26(1) of the Supreme Court Act, 1960 provides:

> A mere technical error by a lower court which has not embarrassed or prejudiced the appellant or caused a miscarriage of justice is not a ground for which an appeal should be allowed.

In the case of OKEGBU V. THE STATE[1] The accused was charged with murder in the High Court of the East

[1] (1979)11 SC.1

Central State of Nigeria. During the trial, the charge was amended twice on the application of the prosecution. The amendments were to the name of the deceased. After the first amendment, a fresh plea was not obtained from the accused person. However, a fresh plea was obtained from the accused after the second amendment. The accused was convicted of the murder of the deceased. He appealed to the Federal Court of Appeal (Now Court of Appeal) which was dismissed. It was argued on his behalf, that failure to obtain a fresh plea from the accused after the first amendment was a contravention of Sections 163, 164(1) of the C.P.A. which rendered the trial null, void and of no effect. The Supreme Court however held a contrary view per Eso J.S.C. who stated:-

> "Where the evidence still justifies a conviction after the amendment was made, the conviction could be affirmed and the appeal dismissed despite the failure to obtain a fresh plea after the amendment. As in this case, the failure to obtain a fresh plea after an amendment was treated as mere irregularity."[2]

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[2] Ibid at 158-163.

In the case of DONATUS V. THE STATE[3] The appellant was charged upon an information with the murder of one Jamilatu Shoetan, before Lagos High Court. The prosecution called a total of ten witnesses. On the day of the close of the case for the defence, Counsel for the accused was called upon to address the court. The counsel asked for an adjournment to enable him prepare his address because, he arrived Lagos the previous night, and there was an electricity failure. He said that the authorities he intended to cite in support of the case for the defence was not brought to the Court. After observing the records, and the previous applications for adjournment, the court refused to grant the application. The prosecution Counsel addressed the court, and the Judge thereafter adjourned for judgement. After a review of the evidence before him and due consideration of the defence open to the accused along with the applicable laws, the trial Judge came to the conclusion that, the prosecution had proved it's case beyond reasonable doubt, that the appellant killed the deceased. The Court found the accused guilty of murder and sentenced him to death by hanging. He appealed to the Court of Appeal, on the

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[3] (1990) 7NWLR (PT.164) 550. See also Micheal Okaroh V. The State Supra Note 11.

ground that, refusal of the trial Judge to grant the application of the defence Counsel for an adjournment to enable him prepare his address, amounted to denial of fair hearing, and therefore vitiated the proceedings.

The Court of Appeal accordingly dismissed the appeal and affirmed the conviction and sentence passed on the appellate by the trial court. Dissatisfied with the decision of the court of Appeal, the appellate appealed to the Supreme Court. The court upheld the decision of the Court of Appeal. Obaseki, J.S.C. stated thus:-

> "It is optional for Counsel to address or not to address court at the conclusion of the hearing of evidence. If he does address the court, he summarizes the evidence, emphasizes the salient points and makes his submissions on them citing legal authorities if any in support. His failure to perform this task does not vitiate the proceedings, although the performance of this duty will be an immense assistance to the Judge during the consideration of the case for judgment."[4]

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[4] Ibid at 574.

The provision of S.379 of the Criminal Procedure Code, enumerates irregularities which do not vitiate proceeding. These irregularities are as follows:-

a) If any court or Justice of the peace not empowered by law issue a search warrant under Section 74 of Criminal Procedure Code , the proceedings shall not be set aside merely on the ground.[5]

Thus, a Magistrate may issue a search warrant, where he is of the opinion that, a search of the premises will further the purpose of any investigation, inquiry or trial. For example, where a court received an information that, a place or places has been used for keeping stolen property, the court may issue a search warrant to a Police Officer, though no investigation has yet begun. In the case of KUKU V. OLUSHOGA[6] The defendant made a report to the police, that the plaintiff was in possession of her stolen gold chain. In consequences of this, the Police obtained a search warrant, searched the premises of the plaintiff, and found a gold chain. The plaintiff was arrested and

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[5] See Section 379(a) of the Criminal Procedure Code

[6] (1962) 1 AII NLR 618, See also Balogun V. Amubikanu (1989)3 NWLR (Pt.107)18.

detained at the Police Station. After investigating the matter, the Police returned the chain to the plaintiff.

There was clear evidence that, the search warrant was grounded upon information sworn not by the respondent, but by a Policeman. The plaintiff brought an action against the defendant for damages for false imprisonment. It was held that, the search warrant was grounded on information sworn to by the Police Officer and not the respondent. Therefore the complaint of the respondent was interposed by the information sworn to by the Police Officer, as a result of which the search warrant was issued. Thus the issue of the search warrant, the arrest and detention attendant thereon, were judicial acts. The respondent could not be held liable in damages.

b) If a court not empowered by law direct under Section 120 of Criminal Procedure Code, a Police Officer to investigate an offence, and he does that in good faith, the proceedings shall not be set aside merely on that ground.[7]

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[7] See Section 379(b) of Criminal Procedure Code See also Circular No.CR/S/40/45 May 30 of 1963 issued by Chief Registrar of Northern Nigeria High Court on the role of the court in criminal investigation, and Zalman, M. (1969) Cases and Material on Law of Criminal Procedure in the Northern States of Nigeria, ABU Press Zaria. P.13.

Thus, a court may direct a Police Officer to investigate, upon receiving a first information report that, an offence has been committed. If the information has not disclosed the commission of the offence, a court has no power to take action, under Section 120 of the Criminal Procedure Code.

c) If a court not empowered by law to take cognizance of an offence under Section 143 of Criminal Procedure Code, For example, where the court receives a First Information Report or compliant, and has reason to believe or suspect that, an offence has been committed, erroneously in good faith does it, the proceedings shall not be set-aside merely on that ground.[8]

The term "taking cognizance" can be defined as, the means by which the courts take notice of a criminal case, in an official capacity.[9]

It should be noted that, where a court, in good faith, takes cognizance in excess of it"s powers, except

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[8] See section 379(c) of Criminal Procedure Code

[9] See Sarker, S.C. (1960) Law of Criminal Procedure (Third) Edition Gouranga Press Private Ltd. Calcutta, p.272.

in cases requiring sanction under S.140-142 of the Criminal Procedure Code, the irregularity may be saved by S.379(c) of the Criminal Procedure Code. In the case of ADAMU SHIWA V. BORNU NATIVE AUTHORITY.[10] The appellant was prosecuted under Section 391 of the Penal Code, on the complaint of a constable lodged in respect of the offence of defamation by the appellant of a witness for the prosecution in a particular case. By virtue of Section 141 of Criminal Procedure Code, the trial court in this case was not empowered to take cognizance of the offence of defamation, on the complaint of the Police. It did take cognizance of the offence, and it did so erroneously in good faith. The accused was convicted. He appealed to the High Court, on the ground that, the complaint was not made by the person aggrieved, in accordance with Section 141 of Criminal Procedure Code. It was held that, by virtue of Section 379(c) of the Criminal Procedure Code, the taking cognizance is not to be set-aside because, the trial court acted in good faith.

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[10] (1964) NNLR 66..

2.2 Irregularities that are Fundamental or Occasion a Failure of Justice

A fundamental irregularity that occasions a failure of justice, is a mistake or errors made by a criminal court during trial of a case. What is always important to note, regarding whether the mistake or error is a fundamental irregularity depends on whether it has occasioned a failure of justice.

The term "Failure of Justice" is difficult to define moreover the criminal procedure code, had not done so. Black's Law Dictionary had defined, Failure of Justice as:-

> "The defect of a particular right, or the failure of reparation for a particular wrong, from the lack or inadequacy of a legal remedy for the enforcement of the one or the redress of the other...[11]

It should, however be noted that the expression "Failure of Justice" and miscarriage of Justice" are used interchangeably and they mean one and the same thing. In the

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11 Henry, C.B. Supra Note 7, 595

case of THE STATE V. GWONTO[12] Nnamani, J.S.C. stated that:-

> "The expression miscarriage of justice is synonymous with the expression "Failure of Justice."

However it's meaning may be illustrated from the decision of courts. For instance, where the trial court failed to comply with the statutory procedure such an action vitiates the proceeding of the court. In other words where the record of proceedings does not show that, the charge was read to the appellant or it was not explained to him. In the case of OGBODO EGEN V. THE STATE[13] At the Abakaliki High Court the appellant was charged with the offence of murder contrary to section 319 (1) of the criminal code, Cap 30 Vol.II Laws of Eastern Nigeria, 1963. The case for the prosecution was that, the appellant had suddenly attacked his brother right inside his room and inflicted several matchet cuts on him. PW1 ran out raising an alarm which attracted their deceased father. Thereupon the appellant pounced on the father and equally inflicted matchet blows from

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12 (1983) ISCNLR 142.

13 (1990) 7 NWLR (PT. 160) 113

which he eventually died. Before the incident, the appellant had never exhibited any abnormal behaviour and had no misunderstanding with any member of the family. In his defence the appellant denied the charge. He said the deceased died as a result of wounds inflicted on him by PW1, during a fight between the deceased and PW1. According to the appellant a fight developed between the deceased and PW1 because, the deceased wanted to discipline PW1 who refused to go and collect yam from a neighbour called Nwite Okpoko. The learned trial judge in his judgement accepted the evidence of the prosecution and discredited the appellant's version of the incident. The appellant was found guilty as charged and sentenced to death. Dissatisfied with the judgement, the appellant appealed to court of Appeal on the ground that, the provisions of section 215 of the Criminal Procedure Act were not observed by the trial court, in that the record did not show that, the charge was read to the appellant or explained to him in the language he understood. The court of appeal unanimously allowed the appeal and stated that:-

"Failure to comply with the statutory procedure will render the whole trial a nullity."[14]

Similarly in the case of IBRAHIM BATURE V. THE STATE[15] The appellant was charged before the High Court of Bauchi for the offence of culpable homicide punishable with death contrary to section 221 of the penal code. On the 14 February, 1985 at Kumo in Bauchi State, the appellant then working on a road in company of other Fulanis at about 10.30pm had a misunderstanding with the deceased, Police Constable Sabaru Garba in company of one lady Aishatu Alhassan. It was alleged that, the appellant stabbed the deceased in the stomach with a knife after both men engaged in a struggle in the fight that ensured knowing that death would be the probable consequence of his act. At the hearing of the case the prosecution called seven witnesses in all, while the appellant testified and called one witness for the defence. The trial court in considered judgement convicted and sentenced the appellant to death. The appellant's appeal to the court of Appeal was dismissed

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14 Ibid at 115

15 (1994) 1 NWLR (PT.320) 267

whereupon the appellant appealed to the Supreme Court. At the hearing of the appeal, the appellant contended that, the High Court which heard this case of first instance was not competent to entertain the case that the required leave to prepare a charge pursuant to section 185 (b) of Criminal Procedure Code Cap 30 Laws of Northern Nigeria, 1963 was not obtained. And further contended that, the requirement is not only mandatory, but also fundamental in that, it goes to the root of the proceedings, and that since there is nothing to show that, the leave sought was granted. The learned Director of Public Prosecution contended that, it is too late for the point by the counsel to the appellant to be taken as an objection, and further contended that, the lapse only amounted to an irregularity, as it did not occasion a miscarriage of justice and the lapse is curable by section 382 of Criminal Procedure Code. The Supreme Court unanimously allowing the appeal stated that:-

> "Failure to comply with the requirements is not a mere irregularity, and non-compliance renders a trial of an accused person under such circumstances a nullity."[16]

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16 Ibid at 271.

However, where there is substantial compliance. For example, failure by the Judge to state that he was satisfied that the accused understood the charge as interpreted to him in his native language, it will be regarded as a mere irregularity that will not render the proceedings void. In the case of MICHAEL PETER V. THE STATE[17] The appellant and Sule were arraigned on a charge of murder of the deceased before the High Courtof Lagos State. On 11 April, 1986 the deceased and PW1 who was at the time 9 years old, went down together towards a stream at Moroga village, Agege, Lagos State. As they were going they saw a man carrying a bag, the appellant and he enquired about their names and they told him. The appellant then ran to the stream, left his bag there and ran back to grab the deceased by the neck from behind. The PW1 was also held but she managed to extricate herself from the grip and ran to call the Police while her sister (the deceased) was taken away. Based on the report made by PW1 the villagers sent a search party that saw the appellant near the scene of the event. The appellant on his confessional statement to the police said that when the villagers asked where he was coming from he told them from the farm. It was when he was

17 (1997) 12 NWLR (PT.531)1

required to show the farm where he worked that he took them to the scene of the crime. He then narrated how himself and two others, Baba Sule and Sule murdered the deceased and cut her private part, which Baba Sule took away. P.W.1 identified the appellant as the man that grabbed the deceased and took her away. The learned trial judge after considering the evidence adduced by both sides found the appellant guilty as charged, convicted and sentenced the appellant to death. The appellant's appeal to the Court of Appeal against his conviction, which was failed. He then further appealed to the Supreme Court contending amongst others that, the mandatory provision of section 215 of the criminal Procedure Law of Lagos State was not complied with in taking his plea. The effect of the above section is that, a person tried upon charge or information prefered against him. Such charge or information shall be read over and explained to him, and shall be called upon to plead instantly. The Supreme Court unanimously, held that the appeal lacks merit, thereby dismissed the appeal and stated that:-

> "... the omission by the trial Judge to record that he was satisfied that the accused persons understood the

charge which was read over to them in the English language and explained and interpreted to them in their native language before they were invited to enter their plea thereto cannot, in my opinion, derogate from the validity of the arraignment. Accordingly I am in agreement with the Court below that the arraignment of the appellant before the trial court was in substantial compliance with section 215 of the C.P.A. and that the same was therefore unimpeachable."[18]

Similarly, in the case of AZEEZ OKORO V. THE STATE[19] The appellant was arraigned on a charge of murder before the Lagos State High Court. The deceased died of a gun short wound which was allegedly inflicted on him by the appellant. There were two eyewitnesses to the incident PW1 and the appellant's wife. In his evidence PW1 clearly testified that, the appellant shot the deceased with his gun. The wife of the appellant, who was not

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18 Ibid at 5.

19 (1998) 12 SCNJ 84.

called as a witness, made a statement to the police in the course of their investigation of the incident which led to the death of the deceased. The investigating police office testified for the prosecution as P.W.3. In the course of his testimony, under cross-examination, the statement made to the police by the deceased's wife was introduced by counsel for the defence who tendered the statement as evidence and it was admitted by the trial Judge as Exhibit E. There was no explanation why she was not called as a witness.

The appellant gave evidence in his own defence. In his Judgement, the trial Judge accepted the evidence of PW1 and rejected that of the appellant. In convicting the appellant, the trial Judge relied on the evidence of PW1 and Exhibit E. On appeal, the court of Appeal affirmed the Judgement of the High Court. On the issues, as to whether there was substantial compliance with section 215 of the Criminal procedure Act, which says in effect, a person tried upon charge or information prefered against him, such charge shall be read over and explained to him and shall be called upon to plead instantly and section 33 (6)(a) of the 1979 constitution, which says that, a person charged with criminal offence,

shall be informed in the language that he understood of the nature of the offence. The supreme court, in dismissing the appeal and stated that:-

> "The provision of the law should not be stretched to a point of absurdity by reading into it that the Judge must record that the charge was explained to the accused to his satisfaction before taking his plea. It will be impeaching the integrity of the Judge to do that as no Judge will take the plea of an accused person if he is not satisfied that the charge was read and explained to the accused to his satisfaction."[20]

However, it is trite law that, the trial court must properly explain to the accused person the offence for which he has been charge. Failure by the trial judge to inform and explain to the accused person the offence to which he has been charged will be regarded as a fundamental irregularity. In the case of SUNDAY KAJUBO

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20 Ibid at 87

V. THE STATE[21] The Appellant was charged in the first instance with the offence of robbery punishable under section 402(2)(a) of the Criminal Code Law Cap 31 Laws of Lagos State 1973. On 25 August, 1981 when the case was called up for hearing, the trial Judge, Oshodi, J. requested the Registrar to take the plea of the appellant and then made the following notes:-

> "Court - Registrar please take the plea of the accused.
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> Plea - case fixed for hearing on 23 September, 1981 accused person to be remanded at maximum security prison Kirikiri until the next adjourned date."

On 30 September, 1981 the trial of the Appellant commenced on the plea as recorded above and three prosecution witnesses testified. On 21 October, 1981 the charge was amended by addition of the second count again of robbery. The appellant was asked to plead to the amended charge and again, the learned trial Judge recorded as follows:-

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21 (1998) 1 NWLR (PT. 73) 721.

"Court - Registrar take the plea of the accused on the amended charge. Accused:- First Count - pleads Not guilty, second count - pleads Not guilty. Court - Does any one intended to recall any of the past witnesses? Mr. Olatunbosun - I do not intend to recall any witness.

The case thereafter proceeded to conclusion and his Judgement the Trial Judge convicted the Appellant and sentenced him to death. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court and the issue of the validity of the trial was raised. It was argued that the trial was a nullity in that there was no proper arraignment in accordance with section 215 of the Criminal Procedure Law of Lagos State. The Supreme Court, unanimously allowing the appeal and ordering a retrial, and held for a valid and proper arraignment of an accused person, the following conditions, as contained in section 215 of the criminal procedure Law of Lagos State, must be satisfied:-

(a) The accused shall be placed before the court unfetted unless the court shall see cause to otherwise order,

(b) The charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court, and

(c) He shall then be called upon to plead instantly there to (unless there are valid reasons to do other wise as provided in section 100 of the Criminal Procedure Law). Failure to comply with any of the conditions stated above will render the whole trial a nullity."[22]

The right of the accused to have assistance of an interpreter, if he does not understand the language used in court is fundamental right therefore, non-compliance by the court in this respect, is a fundamental defect amounting to illegality, and not a mere irregularity. Section 33(6)(e) of the 1979 constitution provides:-

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22 Ibid at 723

> "Every person who is charged with a criminal offence shall be entitled, to have without payment the assistance of an interpreter, if he cannot understand the language used at the trial of the offence.

In the case of SALIHU MOHAMMED GWANTO AND 4 OTHERS V. THE STATE[23] On the 11 July, 1980 the Chief Judge of Plateau State, Justice Obi Okoye, sitting in the Lantang High Court, convicted all the appellants who were among twenty-three accused persons charged with offences punishable under sections 229 (1) and 79(1) of the Penal Code and sentenced them to various term of imprisonment with hard labour up to seven years to run concurrently. One of the ground of appeal before the Federal Courtof Appeal Kaduna, is that since only the first appellant speaks and understands the English language and the second - fifth speaks Hausa, and the latter made their statements and give evidence in court in that language, there must be evidence on the face of the record to show that the proceedings were interpreted to them from Hausa

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23 (1982) 3 NCLR 312. See also POLICE V. BITRUS (1982) 2 PLR 40.

to English and vice-versa, in compliance with section 242(2) of the Criminal Procedure Code. The Federal Court of Appeal Kaduna, held that, the record of proceeding of court must show compliance with the provisions of section 33(6)(e) of 1979 constitution, otherwise there will be an inference that, they have not complied with and such proceeding will be set aside.

The mere absence from the record of the fact of interpretation of the proceedings to an accused person does not ***ipso factor*** connote that, no interpreter was engaged, and a denial of a fair hearing to an accused, to warrant setting aside the proceeding. In the case of MADU V. THE STATE[24] The appellant was charged with the offence of culpable homicide punishable with death contrary to section 221(b) of the penal code. The allegation against the appellant was that he caused the death of one Idi Maiganga by stabbing him with a knife at the left side of his stomach with knowledge that death would be the probable consequences of his act. The appellant pleaded not guilty to the charge. Seven witnesses gave evidence for the prosecution and the appellant testified in his own defence. The learned

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24 (1997) 1 NWLR (PT. 482) 386.

trial judge, after due consideration of the evidence and the submission of the learned counsel for the prosecution and the defence, delivered a reserved judgement in which he found the appellant guilty as charged. The appellant was convicted and sentenced to death. Dissatisfied with the judgement, the appellant appealed to the court of Appeal. The court of appeal dismissed the appeal and affirmed the conviction and sentence imposed by the learned trial Judge. One of the issues raised in the Court of Appeal was that, the evidence of each of the witnesses was, during the proceedings, not interpreted to the appellant from English to Hausa, which was the language that he understood. Further, it did not - appear on the face of the record of proceedings that the provisions of section 241 and 242 of the Criminal Procedure Code, is complied with. The Court of Appeal however held that, if the evidence of these witnesses were expunged from the record and completely disregarded, the evidence of other witnesses warranted and support the conviction of the appellant. It therefore dismissed the appeal. Dissatisfied with the Judgement of the Court of Appeal, the appellant further appealed to the Supreme Court. Unanimously dismissing the Appeal, the Supreme Court stated thus:-

> "Failure to interpret the evidence of the witnesses does not render the whole trial null and void. It is only the testimony of witnesses whose evidence was established not to have been interpreted as required by Law that needs to be expunged from the records."[25]

Section 380 of the Criminal Procedure Code enumerates irregularities which vitiate proceedings. The above provision, declares the procedure of a court to be void, if such a court is not empowered by law to do the followings:-

a) attaches and sells property under Section 68 of Criminal Procedure Code,

b) demands security to keep the peace,

c) demands security for good behavior,

d) discharges a person lawfully bound to be of good behaviour,

e) cancels a bond to keep the peace,

f) makes an order under Section 104 as to a public nuisance,

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25 Ibid at 393.

g) prohibits, under Section 111, the repetition or continuance of a public nuisance,

h) tries an offender,

i) decides an appeal, such proceedings shall be void.

The provisions can now be discussed in details as follows:

a) If any court not being empowered by law, attaches and sell property of person absconding under Section 68 of Criminal Procedure Code, such proceeding shall be void.[26]

It can be understood that, it is only a Judge of the High Court who is empowered to order the attachment of any property of a person absconding. Any other court which does not have coordinate jurisdiction with the High Court, for instance a magistrate court, has no power to make such order, and if it does it is a fundamental irregularity, which vitiates the proceedings.

b) If any court or Justice of the Peace not being empowered by law, orders any person to execute a

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[26] See Section 380(a) of the Criminal Procedure Code

bond with or without sureties for keeping the peace, such an order shall be void.[27]

The person to be bound over must be given an opportunity of being heard. In the case of MRS. MTILE AGBO AND ANGWE ASON V. COMMISSIONER OF POLICE[28] A was jointly tried with M and U by a Senior Magistrate Grade II on an information that A had enticed M away from her matrimonial home and that had abetted the bigamous marriage of M with A by habouring her. The learned Senior Magistrate after taking some evidence ruled that, A's association with M was unlawful, and bound him over, in the sum of 1,000 to be of good behaviour for one year. The court discharged U. On appeal by M and A against their conviction and the order of binding over. It was held that, the Magistrate having lacked jurisdiction, to try the offence of bigamy, the trial was null and void, and the order made was a fortiori a nullity.

c) If any court or Justice of the peace, not being empowered by law order any person to execute a

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[27] See Section 380(b) of the Criminal Procedure Code

[28] MD/104CA/78 (Unreported).

bond for good behaviour, such an order shall be void.[29]

The trial court must inquire into the truth of the information, as to whether there is a strong probability of a breech of the peace in the near future, and not a bare possibility before ordering a person to be bound over. In the case of E.J. KONYE V. COMMISSIONER OF POLICE.[30] The appellant was brought before mixed court, Kaduna on a complaint that, he wanted to cause a breach of the peace, in the Administrator"s office, Kaduna. The mixed court heard a witness for the prosecution, and finding the appellant guilty of the offence contrary to Section 114 of the Penal Code, ordered him to be bound over in the sum of ₦200 to be of good behaviour, for one year. On appeal to the High Court at Kaduna, the order for binding over was set aside on the ground that section 88 of criminal procedure code does not empower a court to order a person to be bound over, but that such power is given by section 93 of Criminal Procedure Code to a court before which such person is brought in compliance with a summons under section 88 and which proceeds under section

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[29] See Section 380(c) of the Criminal Procedure Code

[30] (1965) NNLR 54.

92 to inquire into the truth of the information upon which action has been taken.

The preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour to stipulate and give full assurance to the public, that such offence as is apprehended shall not happen by finding pledges or sureties for keeping the peace, or for their good behavior.[31]

d) If any court not being empowered by law, discharges a person lawfully bound to be of good behaviour, such proceedings shall be void.[32]

e) If any court not being empowered by law, cancels a bond to keep the peace, such proceedings shall be void.[33]

However, a Judge of the High Court may at anytime cancel any bond for keeping the peace or refraining from

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[31] See Mbaoma V. Ejimofor and Others (1978) 1 LRN 15.

[32] SEE Section 380(d) of the Criminal Procedure Code.

[33] See Section 380(e) Ibid.

illegal acts likely to disturb the public peace or for good behaviour.[34]

f) If any court not being empowered by law, makes an order under Section 104 of the Criminal Procedure Code, as to a public nuisance, such proceedings shall be void.[35]

It should be noted that, it is only a criminal court, that has jurisdiction to apply Section 104 of the Criminal Procedure Code, a civil court has no jurisdiction to exercise power under Section 104 of the Criminal Procedure Code, and if it does, no provision under the Criminal Procedure, can cure the error, and the decision arrived at by the civil court is void.[36]

g) If any court or Justice of the Peace not being empowered by law, prohibits under Section 11 of the Criminal Procedure Code, the repetition or

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[34] See Section 100 Ibid.

[35] See section 380(f) Ibid.

[36] See Section 104(1)(2) Ibid

continuance of a public nuisance, such proceedings shall be void.[37]

Thus, where the nuisance committed earlier is not within the territorial jurisdiction of the court, the order may not be valid under Section 111 of the criminal procedure code.

h) If any court not being empowered by law, tries an offender, such proceedings shall be void.[38]

In the case of BONIFACE ABAH AND PAUL OCHE V. COMMISSIONER of Police[39] The appellant were convicted by Magistrate Grade II Kaduna of an offence of conspiracy to commit the offence of cheating under section 97 of the penal code. On appeal to the High Court, it was held that the offence of cheating is by section 322 of the Penal Code, an offence punishable with imprisonment, and therefore conspiracy to cheat under section 97 of the Penal Code, is not an offence triable in the Magistrate's court Grade II in accordance with Section 12 (1) of the

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[37] See Section 380(g) Ibid.

[38] See Section 380(h) of the Criminal Procedure Code

[39] (1972) NNLR 138

Schedule to Criminal procedure code, and to appendix "A" thereof. It therefore nullified the conviction under Section 97 of the Penal Code.

i) If any court not being empowered by law to decides an appeal, hears an appeal, such proceedings shall be void.[40]

An appeal is to have the decision of the lower court reviewed or modified by the superior court. An appeal is always the creature of statute, if a court lacks the power to hear appeal, it cannot decide a case on appeal.[41] In the case of UGWU V. ATTORNEY GENERAL[42] The Supreme Court dismissed an appeal on the ground that, at the time of appeal, there was no right of appeal. The applicant had applied to the Supreme Court for leave to appeal against an interlocutory decision of the High Court of the East Central State of Nigeria, refusing to make an order of certiorari. The respondents filed a preliminary objection to the effect that, there is no right of appeal from the High Court of the East Central State on

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[40] See Section 380(i) of Criminal Procedure Code

[41] See Section 213-220 of the 1979 Constitution.

[42] (1975)6 SC 13.

an interlocutory decision. After taking extensive argument on the competency of the proposed appeal, the supreme court ruled that "all rights of appeal are statutory and in order to exercise a right of appeal, it must be demonstrated by the prospective appellant that such a right has been ... conferred on him by same statutes.[43]

Therefore, from the foregoing discussion it becomes conclusive that any court that does not have jurisdiction to undertake a certain proceedings or decide on an issue, would have such judgment or decision set aside and treated as null and void. From the point of Section 380 Criminal Procedure Code lack of jurisdiction constitutes a fundamental irregularity which would occasion a failure of justice. The sum total is that a trial that occasions a failure of justice must be set aside on appeal.

2.3 Fundamental Irregularities Under the 1979 Constitution

The 1979 Constitution of the Federation, has conferred certain rights on every individual. Where any of the fundamental rights enshrined in the constitution

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[43] Ibid at 16.

has been denied or withheld, such irregularity is fundamental, and the proceeding will be set-aside.

Thus, where any fundamental right enshrined in the constitution has been denied or withheld no provision of any other enactment can save the illegality created by it's non-compliance.[44]

An accused has many rights, including the following:

a) Right to have an impartial adjudicator. Section 33(1) of the 1979 Constitution provides:

> "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure it's independence and impartiality.[45]

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44 See Salisu Mohammed Gwonto and 4 others V. State Supra Note 23.

45 Underlining supplied for emphases.

The term "Civil Right and Obligation" has been defined by Tobi, J.C.A. in the case of KELVIN PERTERSIDE V. I.M.B.[46] as

> "Personal, natural rights guaranteed and protected by constitution, for example, freedom of speech, press, freedom from discrimination; etcetera. Body of law dealing with natural liberties, shorn of excess which invade equal rights of others." "Civil Obligation" is simply defined as one which binds in law, and may be enforced in a court of justice."[47]

Thus, any denial of accuseds', "Civil Rights" is a fundamental irregularity, which vitiates the proceeding of the court.

The independence and impartiality of a judge is sine quanon of a fair hearing. This idea is expressed in the

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46 (1993)2 NWLR (PT.278) 712.

47 Ibid at 730-731.

maxim Nemo Judex in causa sua (No man shall be a Judge in his own cause.

In the case of U.N.T.H.M.B. V. NNOLI[48] Nnoli, an employee of the Teaching Hospital which is a statutory body. Challenged the termination of her employment as Assistant Chief Pharmacist by compulsory retirement as a disciplinary measure following an allegation that, she had been negligent in the course of her work in the process of supervising an unqualified pupil pharmacist. The first appellant interviewed the respondent and Chief Pharmacist. Mr. Nwugor (a trainee pharmacist) admitted compounding the chloroquine syrup and stated, he was supervised during the compounding by the respondent. This assertion was put to respondent and following her answer, she was asked by the first appellant - if she had any previous record of negligence. She was alleged to have answered in the positive. Following which first appellant - compulsorily retired her with full benefits from the service. After due hearing the trial Judge (High Court of Anambra State) declared that, the retirement of the plaintiff was null and void, set-aside the letter conveying it and made an order re-instating

48 (1994) 8 NWLR (PT.363) 379 OR (1994) 10 SCNJ 71.

the plaintiff to her- position in the service, on the ground that there was failure to comply with section 9(1) of the university Teaching Hospitals (Reconstitution of Board) Decree No. 10 of 1985, which provides:-

> "If it appears to the Board that there are reasons for believing that any person employed as a member of the clinical, administrative or technical staff of the Hospital, other than the Chief Medical Director, should be removed from his office or employment, the Board shall require the secretary to give notice of those reasons to the person in question and afford him an opportunity of making representation in person..."

The court of Appeal and later the Supreme Court dismissed the appeal by the defendants and affirmed the Judgement of the lower court, to re-instate the plaintiff in the service, and held that, the appearance of the respondent before an administrative body as a witness, did not confer on the first appellant acting for itself and on behalf of the second appellant, reciprocal rights

of investigator as well as Judge or arbiter all in one go.

Thus, only a person who has no stake in the outcome of a case, be it personal or pecuniary, shall sit and adjudicate upon it.

It is a fundamental irregularity in a criminal proceedings, for a person who has a personal or pecuniary interest to adjudicate on a matter before him. Such irregularities vitiate the proceedings of the trial court. In the case of CHIEF GANI FAWAHINMI V. LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE.[49] The applicant is a Legal Practitioner in Nigeria. He is also an established author - having written seven books. In March 1981 one of his books "The Nigerian Constitutional Law Report Volume 1" was published. The applicant's Volume 2 was published. The Book contained a constitutional law comment on "Locus Standi" in which the stand of the Attorney General of the Federation was attacked. On the 3rd December, 1981 the applicant received a letter dated the 1st December, 1981 from the Office of the Attorney-General of the Federation calling

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49 (1982)3 NCLR 719.

the attention of the applicant to the advertisement contained in the "West Africa Magazine of 23rd March 1981, and requesting him to show cause within 14 days why he should not face the legal practitioners Disciplinary Committee on the matter. The advertisement complained of reads thus:

> "A new book on Nigerian constitution titled Nigerian constitutional Law Reports 1981 volume One. Edited by Chief Gani Fawehinmi, the famous, reputable and controversial Nigerian lawyer.

The Attorney-General of the Federation is the Chairman of the Legal Practitioners Disciplinary Committee. The Attorney General of the Federation directed that, the applicant should appear before the committee to answer the charges on Monday the 25th January, 1982. The applicant instead went to court and filed an application under the Fundamental Human Rights Rules 1979 alleging that his fundamental right to fair hearing under Section 33(1) of the Constitution of Nigeria had been contravened or was likely to be contravened. The kernel of his complaint vis-a-vis the complaint and charges against him is that, the composition of the committee did not secure the independence and impartiality of the committee in that, the chairman of the committee (the Attorney General of the Federation) was both the complainant and the prosecutor, that there was a real likelihood of bias on his part, as chairman of the Disciplinary Committee in the consideration and determination of the said complaint

and charges. It was held that, the position of the Attorney-General as the Chairman of the Committee and as the complainant and the prosecutor, offends against the principles of Natural Justice and raises a substantial issue of real likelihood of bias in the said Disciplinary Committee.

It is trite that an allegation of bias or likelihood of bias on the part of the Judge other than, on the basis of pecuniary interest must be supported by substantial unequivocal evidence. Suspicion alone is not sufficient.[50]

Thus, it is a mere irregularity in a criminal proceeding, if such allegation cannot be supported by evidence, and shall not affect the proceeding of the court.

The rules of procedure also exist to ensure the impartiality of adjudication. Section 374(1) of the Criminal Procedure Code, provides that, no person shall try or commit for trial or sit as a member of the court,

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[50] See Awoniy V. Buremoh (1996)4 NWLR (PT.443) 419. See also Balogun V. Adejobi (1995)2 NWLR (PT.324) 131 at 157

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which tries any case to or in which he is a party or personally interested.

Similarly, the rules of procedure, provides that, it is a fundamental irregularity for a person who has personal interest to adjudicate upon the matter. In the case of UGWUNBA ELISHA V. POLICE[51] The accused was arrested by a Magistrate personally for loading his vehicle in an insecure manner. A superior police officer at the scene appealed to the Magistrate to drop the case, but he refused. The Magistrate lodged a formal report at the Police station and a charge was preferred against the accused when the accused was brought to court before the same Magistrate, the police did not oppose his counsel's plea for bail. But the magistrate refused the application for bail and remanded him in custody. An application for bail was therefore made to the High Court. Granting the application, the High Court declared that, in the circumstances of the case bias could be inferred and need not be proved by extrinsic evidence, and that the magistrate being himself the complainant and the investigator should not have sat to adjudicate on the matter.

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51 (1974) 4 ECSLR 362

b) **Right to a Fair Hearing**

Section 33(4) of 1979 constitution provides:-

> "whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court or tribunal."

There is no definition in the 1979 Constitution as to what constitute a "fair hearing" within the meaning of this provision, and that it is difficult if not impossible to give a precise definition of what it means. However, the term can be illustrated with references to judicial cases. The Supreme Court has of recent revisited it's earlier definition of the term and stated further that:-

> "The term "fair hearing"has been Judicially interpreted to involve situations where, whether having regard to all the circumstances of a case, the hearing may be said to have been conducted in such a manner that an impartial observation will conclude that the tribunal was fair to all the parties to the proceedings. It is

said to mean a trial conducted according to all the legal rules formulated to ensure that Justice is done to all the parties to a cause or matter."

In the case of MILITARY GOVERNOR OF IMO STATE V. NWAUWA[52] The respondent was the traditional Ruler and Eze Udo 1 of Izombe Autonomous community in Imo State until 1988 when, by petitions to the Military Governor of the State, members of his community made various allegations of grave misconduct and Mal-administration against him. The petitions called for his removal from office as the Traditional Ruler of the community. This was immediately followed by violent disturbances in the community which resorted in the loss of property estimated at several million of Naira. The State Government reacted by appointing an Administrative panel of inquiry, to investigate the allegations of grave misconduct against the respondent pursuant to the provisions of section 18 (1) and (3) of the Traditional Rulers and Autonomous community Law No. 11 of 1981 as amended by Edict No.5 of

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52 (1997|) 2NWLR (PT. 490) 675 - SC, See also Shylon V. Asun(1994) 6 NWLR (PT. 359) 670 and U.N.T.H.M.B.V. Nnoli Supra note 48.

1989 of Imo State. The Panel of Inquiry had seven terms of reference to investigate. The Panel commenced its assignment with the respondent in attendance and fully represented by Counsel of his choice throughout the proceedings. Memoranda were filed by interested parties and witnesses duly testified before the panel and were dully examined in-chief, cross-examined and re-examined. At the conclusion of the inquiry, the panel found that respondent had lost gross support of the people of Izombe. In respect of term (four), it found that the respondent received certain sums of money on behalf of the community. Thereafter, the panel made recommendation for the withdrawal of the recognition of the respondent as the traditional ruler of Izombe. Following the said recommendation, the State Government issued it's white paper thereon. By legal notice No.21 of 1989 dated the 11 August, 1989. The Military Governor withdrew the official recognition of the respondent as the Eze or Traditional Ruler of Izombe Autonomous community. The respondent challenged his removal from office in the High Court, Owerri. The trial court found that the withdrawal of the recognition of the respondent was legal and accordingly dismissed the respondent's case. The respondent appealed to the court of Appeal. The Court of

Appeal, by Majority decision found that the panel of inquiry appointed by the Military Governor of Imo State acted without jurisdiction in investigating the charges of a criminal nature laid against the respondent. It allowed the respondent's appeal, set aside the decision of the High Court and entered Judgement in respondent's favour. The appellants being dissatisfied with the decision of the Court of Appeal, appealed to the Supreme Court contending inter alia: that the Court of Appeal was wrong in holding that the allegations of crime could not be severed from the other allegations which were of non-criminal nature, that the respondent's right of fair hearing was breached and that the conduct of a referendum was the only method of determining the level of support enjoyed by a traditional ruler of a community. The Supreme Court, unanimously allowing the appeal stated:-

> "A hearing cannot be said to be fair if any the parties is refused a hearing or denied the opportunity to be heard, present his case or call his witnesses. In the present case, however, the respondent not only testified on his own behalf but called many witnesses as he wished. He was

also legally represented by counsel of his own choice throughout the entire proceedings. Thus, the respondent was fully heard and was afforded the opportunity of being heard or representing his case even with the assistance of counsel before the panel. In these circumstances, no question of any breach or violation of the respondent's constitutional right to fair hearing can conceivably arise."[53]

Similarly, in the case of KUUSU V. UDO[54] This suit started in the Grade II Area Court of Anibit Benue State, the respondent/Plaintiff claimed against the defendant/appellant for title to a piece of farmland at Ubwage. Judgement was given for the plaintiff at the Area Court in 1981. The defendant appealed to the High Court of Benue State sitting at Gboko which entered Judgement in his favour on the 18 March, 1983. The

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53 Ibid at 683.

54 (1990) 1 NWLR (PT. 127) 421 or (1990) 1 NSCC 253. See also Ariori V. Elemo (1983) 1 SC 13 at 24 and Robert Okafor V. A.G. Anambra State (1991) 6 NWLR (PT. 200) 659 at 678.

battle between the parties was far from over, for the respondent herein appealed against the High Court Judgement to the Court of Appeal. The appeal was allowed on the 3 February, 1986 and entered Judgement in Favour of the plaintiff (respondent herein). Dissatisfied with the court of Appeal judgement, the defendant/appellant has now appealed to the Supreme Court. It was held that, the witnesses in the instant case were given equal opportunity to testify in respect of the land in dispute. Absence of cross-examination of the witnesses is not a fatal defect.

However, it will amount to a fundamental irregularity for a court to deny an appellant an opportunity to present his defence. In the case of SALU V. EGEIBON[55] In this land suit before the High Court of Ogun State in which the parties had filed and exchange pleadings, hearing commenced on 21 February, 1984 when the plaintiff and one witness testified in support of his case. Counsel for the plaintiff then sought an adjournment to enable him call two more witnesses. One is the person who sold the land to him and secondly the

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55 (1994) 6 NWLR (PT. 348) 23 or (1994) 6 SCNJ 223.

surveyor who drew the plan which he had tendered, whose evidence was vital to prove the boundaries of the land claimed. On 16 April, 1984 contrary to expectation, the plaintiff did not call any more witnesses. Then the court called on the counsel for the defendant to open the case for the defendant. The defence counsel then requested the court for adjournment to another date to enable him call evidence because his client and her witnesses were absent. The counsel for the plaintiff did not oppose the application for adjournment. The trial judge refused the adjournment. On 16 May, 1984 counsel for both parties delivered their addresses and on 13 July, 1984 the trial Judge delivered his judgement in which he granted all the reliefs which the plaintiff claimed. On appeal, the Court of Appeal allowed the appeal against the Judgement of the trial Judge, set aside the Judgement of the trial Judge and ordered a re-trial of the suit before another court of equal jurisdiction. The appeal by the plaintiff against the Judgement of the Court of Appeal was dismissed by the Supreme Court which affirmed the Judgement of the Court of Appeal and held that, what was involved was much more than a mere refusal of an application for an adjournment. It involved the respondent not being given any chance to

present her defence which resulted in her being completely denied the opportunity of a fair hearing under section 33(1) of the constitution of the Federal Republic of Nigeria, 1979.

The Supreme Court has defined fair hearing within "a reasonable time"

> "... the period of time which in the search for Justice does not wear out the parties and their witnesses and which is required to ensure that Justice is not only done but appears to reasonable persons to be done."[56]

In the case of OSIGWE EGBO V. AGBARA[57] The respondents in this appeal as plaintiffs in the High Court sued the appellants as defendants claiming a declaration of titled to the piece and parcel of land known as "kaliema"and "Okobebe"situate at Opolo village Yenagoa in Brass Division of the former Rivers State of Nigeria, one hundred naira general damages for trespass, as well as an order of perpetual injunction restraining

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56 See Ariori V. Eleme Supra Note 54.

57 (1997) 1 NWLR (PT. 481) 293.

the appellants form committing any further trespass on the said piece of disputed land. Pleading were ordered and duly settled. The identity of the disputed land was not in issue though the appellants called it "Kaliama" and "kovia" while the respondents called it "Kaliama" and "Okebede". Both parties relied on acts of long possession and traditional evidence for their root of title. After pleading were settled, hearing of the case commenced before Dagogo Manuel, J. The trial Judge was transferred to the Port Harcourt Judicial Division. The case was then referred to Justice, Manuel Dagogo again who was still at Port Harcourt High Court. Judgement was delivered in favour of the respondents granting their claims of declaration of title, damages for trespass and injunction. The appellants being dissatisfied with that decision appealed to the court of Appeal contending inter alia that, Dagogo Manuel, J. had no Jurisdiction to continue with the trial of the case which he had commenced at the Ahoada Judicial Division, without an order of transfer from the hand of the Chief Judge of Rivers State, and that the delay and lapse of time between the commencement of taking of evidence of witnesses and the judgement breached the fundamental rights of the appellants to fair hearing entrenched in

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section 33 of the 1979 constitution and as such the entire proceedings is vitiated. The court of Appeal dismissed the appeal and the appellants further appealed to the Supreme Court, which unanimously dismissed the appeal and said that:-

> "... In the present case, even if the transfer order in issue is irregular by the mere fact that it is under seal, the irregularity neither materially affected the merits of the case nor endangered any miscarriage of Justice. Besides, the appellants were at all material times represented by counsel throughout the trial period of seven years, but registered no protest to the transfer of the case from Ahoada to Port Harcourt Judicial Division. Consequently, the appellants cannot be heard having acquiesced in and fully participated in the proceedings, to complain against the said order of transfer."[58]

The principles of Natural Justice, are essential to a criminal trial, for example,the rule of audi alterem

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58 Ibid at 298.

partem, which requires that, the accused person must be heard before a case is determined.

It is a fundamental breach of principles of Natural justice, for an appellant not be served with any memorandum of charge, before an orderly room trial conducted. In the case of MICHAEL AGHA V. I.G.P.[59] The appellant was enlisted in the Nigeria Police Force, on 1 June, 1977. He was at the commencement of the suit, a corporal in the police force. On 31 May, 1988 the appellant was beaten by rain in the course of his official duties. He went home to change his clothes. At about 6.30pm on the same date, the appellant called at the mobile police station. One ASP Garba Usman seized the appellants cap and deposited same with the duty secretary, as been improper dressing. The appellant was thereafter placed on orderly room trial. He was not served with any memorandum of charges and intermittently subjected to intimidation and threat by trial officers, and later was informed that, he has been dismissed from Nigeria Police Force. He sued the respondents at the Makudi High Court, seeking a declaration that, his dismissal from the Nigeria Police Force is null and void,

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59 (1997) 10 NWLR (PT. 524) 317

and violated section 33 of the 1979 constitution. One day before the Judgement was to be delivered, the respondents brought an application that, the suit be dismissed on the ground that, the High Court had no Jurisdiction to hear it by virtue of Decree No. 107 of 1993, which ousted the jurisdiction of the High Court to adjudicate on declaratory reliefs against the Federal government or her agents. The Trial Court nevertheless proceeded to deliver its judgement, dismissing the appellant's case on the ground that he did not prove same. Being dissatisfied with the judgement, the appellant appealed to the court of Appeal. Unanimously allowing the appeal. The court of Appeal stated:-

> "The procedure adopted by the respondents at the orderly room trial conducted for the appellant fell short of those requirements and it therefore amounts to a serious infraction of the appellant's constitutional right to fair hearing."[60]

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60 Ibid at 320 - 321.

c) **Right to be Presumed Innocent**

Section 33(5) of the 1979 constitution provides that, every person who is charged with an offence shall be presumed innocent until he is proved guilty. Thus, the burden of proving the guilt of accused person beyond reasonable doubt lies upon the prosecution.

What amounts to proof beyond reasonable doubt? The Court of Appeal in the case of OKONKWO V. OKEKE[61] provides the meaning of "proof beyond reasonable doubt" as:-

> "It is proof that precludes every reasonable hypothesis, except that, which intends to support and is proof which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusion."

The Supreme Court in the case of UGWUMBA V. THE STATE[62] explained the term "proof beyond reasonable doubt", as:-

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[61] (1996) 3NWLR (PT.435) 181. See also Abioye V. State (1987) 2NWLR pt.58) 647

[62] (1993)5NWLR (PT.296) 660.

"A formulation which only raises the issue whether the case against the accused person had been proved beyond reasonable doubt, is not merely raising the issue of the burden of proof. It questions the proof of the essential ingredients of the offence and the validity of the procedure adopted."

Thus, the accused should be discharged forthwith, if the prosecution failed to prove the essential ingredients of the offence and it is not for the accused to prove his innocence. It amounts to breach of the accused's fundamental right to fair hearing, where the trial judge shifted the burden on the accused person. In the case of ALABI V. THE STATE[63] The appellant and another were charged at the High Court of Lagos State with the offences of conspiracy to commit armed robbery, contrary to sections 403(a) and 402(2) (a) of the Criminal Code (Amendment) No.1 of the Lagos State. At about 7.15p.m on 7 September, 1981 the complainant, was driving his

63 (1993) 7 NWLR (PT.307) 511, See also Adigun V. A.G. of Oyo State (1987) 1 NWLR (PT. 53) 678.

Peugeot 305 Saloon Car with registration No. LA 899 AJ along Allen Avenue, Ikeja in the company of a German expatriate Rolan Vergo, when some men pounced on him. One of the men forced open the driver's door and demanded for his keys and money, and inflicted machet cuts on his head and left thumb before he manage to escape, abandoned his car which the armed robbers made away with. The complainant lodged a report of the incident at the Ikeja Police Station the same day. Subsequently, the appellant and the first accused were arrested in Ibadan while in possession of the car, and brought to Lagos, to State C.I.D. Panti. At the end of the trial, the learned trial Judge expressed his dissatisfaction with the evidence adduced by the first accused and the appellant in that they did no convince him as to their innocence. The learned trial Judge convicted them as charged, and sentenced them for armed robbery and conspiracy. Dissatisfied with their conviction, the appellants appealed to the Court of Appeal. The appeal was dismissed and the decision of the trial Judge affirmed. The appellant dissatisfied with the court of Appeal's decision appealed further to the Supreme Court. The Supreme Court in allowing the appeal stated thus:-

> "Where, as in the instant case, a trial court casts the burden of convincing it, of his innocence on the accused person, it amounts to misdirection, as to where the onus lies, and will be in breach of the accused's fundamental right to fair hearing... In such a situation the accused person need not go further to prove a miscarriage of justice. The miscarriage is inherent in the violation of the fundamental right."[64]

Also the rules of Evidence Act provides that, in Criminal cases, the burden of proving beyond reasonable doubt, is on the prosecution to prove the guilt of the accused person. For example, section 138 of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990 provides that:-

> "If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is subject to the provisions of Section 141 of the Act on the person who asserts it, whether the commission of such act is or is not directly in

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[64] Ibid at 515.

> issue in the action. If the prosecution prove the commission of crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused."

However, the provision to Section 33 (5) of the 1979 constitution, lays down that, the law may impose upon accused person the burden of proving particular facts necessary for establishing certain specific defence. Such procedure if adopted, shall not vitiate, the proceeding of the court. In the case of CHRISTOPHER OTTI V. INSPECTOR GENERAL OF POLICE[65] The appellant was convicted of carrying on business as a money lender without being in possession of a valid licence. On appeal against his conviction, the appellant argued that, the prosecution had not proved that,the appellant had possessed no license. Hurley, C.J. of the High Court, declared that, the onus of proving he had a licence rested on the appellant as being a fact peculiarly within his knowledge, as laid down by section 141 of the Evidence Act.

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[65] (1962)NRNLR 1

d) Right to be Informed promptly of charge.

Section (33)6) (a) of the 1979 Constitution, provides that, a person charged with a criminal offence shall be informed promptly in the language he understands of the nature of the offence.

The main purport of Section 33(6)(a) is to make it mandatory for the prosecution and the court to inform the accused person of the offence for which he is accused, and thus enable him prepare his defence.[66]

Thus, in a criminal proceedings, it is mandatory for a court to read and explain the charge to an accused person, so that, he will be in a picture of the offence against him, to enable him prepare his defence. It is a fundamental irregularity, for failure to comply with this procedure which shall vitiate the proceeding of a court on appeal.

In the case of EZEALA V. THE STATE[67] The appellant was charged with the offence of murder, in that he killed his wife, the deceased on 3rd of January, 1982 contrary

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66 See Maja V. the State (1980) ICLR 212

67 (1996)6 NWLR (PT.456)617

to section 319 of the Criminal Code of Imo State. The appellant and the deceased were living in Lagos. In December, 1981 both of them returned to their hometown, for the final burial rite, of the appellant's father. The appellant later went to check for the deceased in her family home, but was informed by the deceased's brother that because, of the maltreatment the appellant meted to the deceased in Lagos, he should go and bring his relations, so that the matter would be resolved between the two families. After the issues resolved,the appellant and deceased went out, but the deceased never returned to her family home. Her body was later discovered in a pool of blood, battered with knife cuts and wounds all over her body, along the road leading to the appellant's home, the appellant was arrested and subsequently charged to court. It happened, however that, at the trial, the charge was neither read nor explained to the appellant, and infact his plea was never taken. After the conclusion of the trial, the appellant was convicted as charged and sentenced to death. Being dissatisfied with the judgement, he appealed to the Court of Appeal. The Court of Appeal, in allowing the appeal stated thus:-

"The provisions of Section 215 of the Criminal Procedure Law (which provision is similar to Section 156 of Criminal Procedure Code) and Section 33(6)(a) of the 1979 Constitution of Nigeria guarantee to an accused person to be charged promptly with the charge read to him in the language that he understands, and any infraction of Section 215 and 33(6) (a) will lead to a declaration of such trial to be a nullity."[68]

e) **Right to Adequate Time and Facilities to Prepare Defence**

The right of an accused to be defended by a legal practitioner of his own choice would be meaningless if it did not include a right to adequate time and facilities for the preparation of defence.

Section 33(6)(b) of the 1979 Constitution, states that, an accused person is entitled to be given adequate time and facilities for the preparation of his defence.

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[68] Ibid at 619.

It should be noted that, it is mandatory in a criminal proceedings, to allow an accused person a sufficient time to arrange all his defences. For example, if he intends to secure the services of a lawyer, for him to consult one, and should be given enough time to arrange all evidence for his defence. Anything short of that, it violates the constitutional right of the accused person, which is a fundamental irregularity in criminal proceedings, and vitiates the trial. In the case of GOKPA V. POLICE.[69] The accused applied for adjournment to enable him arrange for a Counsel. The Magistrate adjourned the case to the same afternoon. Naturally, it would not have been possible for the accused to consult any Counsel because, the place where a Counsel could be consulted was far away. The trial resumed that afternoon. The accused was convicted on various counts of stealing and forgery. On appeal against conviction, it was held by the High Court of the then Eastern Nigeria that, notwithstanding the desire of the Magistrate to dispose of a long pending case, the right of the accused to have adequate opportunity of defending himself must be upheld.

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[69] (1961) 2 ALL NLR 423.

However, the court can exercise it's discretion inspite of the provision of Section 33(6)(b) of the 1979 constitution to refuse adjournment, which has no merit. Even though it contravened the fundamental right of accused person, however it is regarded as a mere irregularity, which does not vitiate the proceeding of a court. Thus, in the case of OMEGA V. STATES[70] Where during the trial, the accused had plenty of time to summon his witnesses, but did not do so, the refusal of the trial Judge to grant him an adjournment at the close of the prosecution's case in order to call his witness was held to be right and not contrary to Section 33(6)(b) of the 1979 constitution.

f) **Right to Counsel**

Section 33(6)(c) of the 1979 constitution guarantees the right of an accused person to defend himself in person or by a legal practitioner of his own choice.

Even though right and justice may be on the side of a party yet his case will have to be properly presented to the court in a form acceptable to the court. It is

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[70] (1964) 1 ALL NLR 379.

not possible for ordinary people to know in what form will their cases be acceptable to courts. Every person must have the right to be defended by a counsel of his own choice who knows the law and procedure on which such person's fate may hang.[71]

It is important to note that an accused person has the right to defend himself in person or be represented by a counsel of his own choice. Therefore an option is given to the accused person either to defend himself or be defended by a legal practitioner. In ordinary criminal cases, which are not capital offences, an accused person may elect to conduct his case by himself, but in capital offences, to allow the accused person to conduct his defence by himself may not meet the end of justice. In order to make sure that the accused has been given fair hearing in cases involving capital offences, for example, culpable homicide punishable with death. The court has interpreted section 33(6)(c) as a mandatory provision. It would amount to a miscarriage of Justice for a trial court to allow an accused person to be

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[71] See Oputa, C (1986) "Fair hearing. A Necessary Pre-requisite to effective Judicial Enforcement of Rights. The Nigerian Experience "Paper presented at the First Commonwealth Law Conference held in Banju, Gambia 1986.

undefended in capital offence. To do so will vitiate the proceedings. In the case of . In the case of JOSIAH V. THE STATE[72]. The appellant, Godwin Josiah was one of three persons arraigned before the High Court of Bendel State sitting at Ogwasniuku, for a charge of murder. The appellant had been convicted of murder by the trial court. The conviction and sentence were sustained by the Court of Appeal. On further appeal to the supreme court, it was contended for the appellant that the trial court erred in convicting him because, firstly the appellant was not represented by a legal practitioner throughout the trial and secondly, the trial Judge failed to inform him of his rights as stipulated in section 287 of the Criminal procedure Law of Bendel State, before calling on him for his defence. The Supreme Court unanimously allowed the appeal, and the appellant is hereby sent back to an appropriate High Court for trial on a charge of murder, and also state that:-

> "What is a hearing worth to an accused person who does not understand the language of the court, who does not know the rules of procedure, and who cannot properly present his case? The

72 (1985) 1 NSCC 132

right to counsel is thus at the very root of and is the necessary foundation for a fair hearing. The ordinary layman, even the intelligent and educated layman, is not skilled in the science of law and he therefore needs the aid and advice of counsel. It is because of this need that, in capital offences, attracting the death penalty, the accused is not left undefended. If he cannot afford the services of counsel, the state assigns one to him.[73]

Failure for a court to allow Counsel to an accused person, is a fundamental irregularity in criminal proceeding, which vitiates proceedings. In the case of PETER UZODIMA V. COMMISSIONER OF POLICE[74] The appellant appealed against his conviction and sentence for the offence of theft under Section 287 Penal Code at the Grade I Area Court Otukpo. He was accused of stealing a motor car registration No BN 3030 TA valued at ₦3,948

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73 Ibid at 144.

74 (1982)2NCLR 325.

property of one Miss Alamotu Alhaji Ali. He was found guilty of the offence, and sentenced to two years imprisonment. The Area Court Judge refused to allow his counsel to defend him, ostensibly because, Section 390 of the Criminal Procedure Code denies a right of audience to Lawyers. On appeal, the appellant alleged the breach of his fundamental right under Section 33(6)(c) of the constitution. It was held by the High Court Oturkpo (Benue State) that, Section 33(6)(c) of the constitution is intended to do away with any law or rules which denied representation by counsel in criminal prosecution. Appellant was accordingly acquitted and discharged.

Similarly, the Court of Appeal in the case of TAJUDDEN BELLO V. THE STATE.[75] The appellant was charged under Section 1(2)(a) of the Robbery and Fire Arms (Special Provision Act) 1970 for the offence of robbery. He was not represented by a legal practitioner at the trial. Some efforts were made by the lower court to get Legal Aid Council to assign a legal practitioner to defend the appellant. The Legal Aid Council replied that, Under the legal Aid Act, the offence of the appellant did not come within the jurisdiction of the

[75] (1981)2NCLR 677.

Legal Aid Council. As a result, no further effort was made to get Counsel assigned to the appellant who at the conclusion of the trial was found guilty and sentence to death. It was held by the Federal Court of Appeal Ibadan that, failure of the State to assign a legal practitioner to defend an accused person charged with a capital offence amounted to a denial of fair hearing under Section 33 of the 1979 constitution. Appellant was accordingly acquitted and discharged.

See also the case of UDO V. THE STATE[76] The appellant was arraigned in the High Court of Justice Akwa Ibom State holden at Oron for murder. Counsel was assigned to the accused person by the court in compliance with section 352 of the criminal procedure law. On a day when the presentation's witnesses were present, counsel for the defence was not in court. He had applied to the court to have the case adjourned as he was addressing another court in a murder case. The trial judge refused an adjournment and the trial proceeded. On the next adjourned date, counsel for defence applied for release from the case on the ground that he did not know who would be responsible for his fees. The application was

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76 (1988) 6 SCNJ 181 or (1988) 1 NSCC 1163.

refused. At close of prosecution's case, defence counsel closed his case without calling any evidence, when called upon to address the court, he merely said "I leave it to the court" The appellant was convicted, and he appealed to the court of Appeal which dismissed his appeal, affirming the Judgement of the trial court. The appellant appealed further to the Supreme Court on the ground that he had not been accorded fair hearing, having regard to the conduct of counsel in the case. It was held that, it is not correct to say that, once an accused person in those circumstances retains the service of a legal practitioner or has one assigned to him, the requirements of the provisions of section 352 CPL and section 33 (6)(c) of the constitution are satisfied. Those provisions can only be satisfied when the legal practitioner is present and renders all necessary professional service to him all through the trial. Appellant was accordingly acquitted and discharged.

The right of legal representation is very significant because, Section 186 of the Criminal Procedure Code, also provides that, where a person accused of a capital offence, cannot afford a Counsel, the court shall assign a legal practitioner for him.

If the court appoints a counsel, to defend the accused person, such court has no power to change with another counsel, without the consent of the accused person, otherwise it is a fundamental irregularity, which vitiates the criminal trial. In the case of MAMMAN IBRAHIM V. STATE[77] The appellant was charged with culpable homicide punishable with death, under section 221 of Penal Code before the Sokoto State High Court sitting at Birnin-Kebbi where prosecution opened his case and called four witnesses. The appellant was defended by one Abubakar a Legal Practitioner assigned by the court to do so, as a State brief and with the approval of the appellant. The case was then transferred to Sokoto for continuation on the application of the prosecution and with the consent of the defence counsel. At Sokoto and before further hearing in the case started. Abubakar applied to withdraw his appearance because of the expenses in traveling to Sokoto. The court granted his application and assigned Mr. J.C. Shaka another legal practitioner. The change was effected without consultation with the appellant. At Sokoto, the prosecution called one more witness. Mr. Shaka elected not to put the appellant on his defence.

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77 (1993)2NWLR (PT.278) 735.

After addresses by Counsel of the prosecution and defence, the trial Judge in a considered judgement found the appellant guilty and sentenced him to death. He appealed to the Court of Appeal. Allowing the appeal, Achike, J.C.A. stated thus:-

> "If the learned trial Judge, in appreciation of other provisions of Section 33(6)(c) of the 1979 constitution that, assures appellant's right to defend himself in person or by legal practitioner of his choice, expressly sought the approval of the appellant with regard to the assignment of Mr. Abubakar as his Counsel. It seems clear to me that, it was obligatory for the same court to have first sought the approval of the appellant before unilaterally changing the legal practitioner already approved by him..."[78]

It should be noted that, a litigant is free at all times to change his counsel. He can do so personally in court by announcing it or through any counsel of his choice. In the case of NIGERIAN UNION OF RAILWAY MEN V.

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[78] Ibid at 737.

NIGERIAN RAILWAY CORPORATION[79] Uwaifo, J.C.A. stated thus:-

> "I cannot conceive of an interpretation of order 4 of the High Court of Lagos State (Civil Procedure) Rules which would give the court some discretion to decide, who a litigant may engage as his counsel to continue his case in court and how. The court has no such discretion to give leave to a litigants to change his counsel. If such discretion were to exist it would also imply that, the court could refuse such leave..."[80]

g) **Right to Call and Examine Witnesses**

Section 33(6)d) of the 1979 constitution grants the right to accused person to call and examine his witnesses.

The aim of cross-examining is to enable the cross-examining party to demolish or weaken the case of the party being cross-examined, and also to afford the cross-examining party the opportunity of stating or presenting his case through the witness of it's opponent.

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[79] (1996) 9 NWLR (PT.473) 490

[80] Ibid at 494.

It is a basic prerequisite for a fair trial, for an accused person to be allowed to cross examining witnesses called by the prosecution. Any infringement of the provision, vitiates the proceedings. In the case of IWUOHA V. OKOROIKE[81] The trial Judge refused to allow the defence counsel to cross-examine the respondent on any point other, than on the issue of damages. Edozie, J.C.A. stated thus:-

> "... It seems to me therefore that the course taken by the learned trial Judge in restricting the appellant's counsel to cross-examination without allowing him establish through the respondent the defences of justification and privilege is an act which seriously undermined the appellant's right to fair hearing."[82]

h) **Right to Have an Interpreter**

Section 33(6)(e) of the 1979 constitution provides:

> "Every person who is charged with a criminal offence, shall be entitled to have, without payment, the assistance

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81 (1996)2NWLR (PT.429) 231

82 Ibid at 238

> of an interpreter if he cannot understand the language used at the trial of the offence.[83]

The importance of the interpretation of the proceedings of a trial to the accused as an ingredient of justice and fair hearing cannot be over emphasized.

An accused person can hardly have a fair trial if he does not comprehend, due to language barrier, what the witnesses are testifying against him. Only if he understands the evidence adduced at the trial can be and fully defend himself against the allegations levelled against him.

Non compliance with the provision by the court is a fundamental defect amounting to illegality, and not mere irregularity. See the case of SALIHU MOHAMMED GWONTO AND 4 OTHERS V. THE STATE[84]

If the accused understands the language of the court, failure to provide an interpreter, does not

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[83] See Section 241 of Criminal Procedure Code.

[84] See Supra note 23

occasion a miscarriage of justice. The court of appeal in the case of UCHENGBU V. THE STATE[85] stated thus:-

> "Failure to provide interpreter is a mere defect, and not fundamental flow. In the instant case failure to provide an interpreter for the translation of the Ibo version of the proceedings to English language is not fundamental as the accused understand English and also speak Ibo."[86]

i) **Right to Obtain Records of Proceedings**

Section 33(7) of the 1979 Constitution provides that a convicted person is entitled to have within seven days of the conclusion of his case, a certified true copy of the proceedings in the case.

A convicted person can exercise his right of appeal, only when he is in possession of the full records of the proceedings.

Right of appeal, is a creature of statute, provided in Section 220 - 225 of the 1979 constitution, and a denial is fundamental defect. To obtain a records of

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[85] (1993) 8NWLR(PT.309) 89.

[86] Ibid at 92.

proceeding is mandatory. In the case of POLICE V.BITRUS[87] Emofo, J. refuses to accept an affidavit of the trial magistrate as a substitute for the proper record of proceedings.

j) **Right against Trial Under Ex post Facto Legislation**

Section 33(8) of the 1979 constitution, no person shall be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty heavier than penalty in force at the time the offence was committed shall be imposed for any criminal offence.

The provision prohibits legislation on which converts what was an innocent act of omission into an offence. An enactment has no retrospective operation. For instance, the law looks forward and not backward. Kayode, Eso, J.S.C. in the case of SALAMI AFOLABI AND OTHERS V. GOVERNOR OF OYO STATE OTHERS[88]

Where an offence committed by an accused person may be tried under two different provisions or law, the trial

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87 (1982)2PLR 40

88 (1985)9 SC 117

court may elect to try the accused person based on any one of the provisions or law. Such decision of the court will not amount to a miscarriage of justice. In the cased of GODWIN IKPAS V. BENDEL STATE[89]. The appellant was charged with murder before the High Court of Bendel State, at the time when the offence was contained in the Criminal Code of Western Nigeria then applicable in that state. At the time of his trial however a new criminal code law, also containing the offence of murder had been introduced in the State. There was a provision in the law permitting trial either under the law or under the code. The appellant was tried and convicted under the law. On appeal, to the Federal Court of Appeal it was dismissed. There was a further appeal to Supreme Court, where it was contended that, Section 33(8) of 1979 constitution had been infringed because, the law was not in force at the time, the appellant committed the offence. This argument was rejected by the Supreme Court, holding that, by virtue of the provision in the law mentioned earlier, it was competent, legal and constitutional to have tried and convicted the appellant of murder which is an offence known both to the code and the law. At the time the appellant killed the deceased,

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[89](1982)3 NCLR 152

murder was an offence known to the code, the law then in force.

k) **Right to Raise the Plea of Autrefois Acquit or Autrefois Convict**

Section 33(9) of the 1979 Constitution provides that:-

> "No person who shows that, he had been tried by any court of competent jurisdiction for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a Superior Court."

Furthermore, section 33(10) of the 1979 constitution provides:-

> "No person who shows that, he had been pardoned for a criminal offence shall again be tried for that offence."

This provision is similar to what is called under the Common Law rule as autrefois convict or autrefois aquit or in United States rule against double jeopardy.[90]

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90 *See the Fifth Amendment to the United States constitution.*

Where such a retrial was ordered by a competent court, it is not an infringement of Section 33(9), and will not vitiate the proceedings. In the case of NAFI'U RABIU V. THE STATE[91] Appellant was charged with culpable homicide (punishable with death) of his wife, Hajiya Fati Muhammad Nafi'u on the 10th May 1979. He was discharged and acquitted by the Kano State High Court. The state appealed against the decision to the Federal Court of Appeal which entered a verdict of culpable homicide not punishable by death. Rabi'u was sentenced to 4 years imprisonment. On further appeal to Supreme Court, by the state against the conviction and sentence of the respondent for culpable homicide not punishable with death instead of culpable homicide punishable with death, also the respondent's counsel argued that, the proceedings amounted to a second trial of the respondent on the same facts and contravened his rights under Section 33(9) of the 1979 constitution. It was held that, Section 33(9) of the 1979 constitution, clearly anticipates that, in the course of a trial of an accused person from courts to courts for one and the same criminal offence, a court higher than the last of the intermediate courts, may order a retrial not withstanding

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[91] (1981)2NCLR 293.

that in the process of trial from one court to the other, one of the acquittal in respect of the accused person, in those circumstances, there is still, but one and the same trial, and not as learned counsel of the appellant contends another or second trial.

Applying the principle enuciated by Idigbo, J.S.C. in the case of Nafiu Rabiu V. State (Supra) Orah, J.C.A. in the case of ZAKARI GONI V. THE STATE[92] had this to say

> "... A second trial in the same case is and must be regarded as only a continuation of the same jeopardy which began with the trial. That is not putting a man, as in the instance case, into double jeopardy."[93]

1) **The Right to Remain Silent**

Section 33(11) of the 1979 constitution provides that, no person who is tried for a criminal offence shall be compelled to give evidence at the trial.

The effect of the Section is that, though an accused is a competent witness in any criminal proceedings against himself[94] he cannot be compelled to appear as one.

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92 (1996) 7 NWLR (PT.458) 111.

93 Ibid at 114.

94 See S. 159(a) of Evidence Act and Section 236(1) of the Criminal Procedure Code.

Where the accused is shown to have been compelled to testify against himself, such procedure is a fundamental defect, and the trial should be void. In the case of ABACHAM V. STATE[95] The trial Judge in the High Court Calabar had put the accused, who was charged with contempt of court, into the witness box and examined him. This was in the face of the objection of the defence counsel to the competence of the trial Judge to compel the accused to testify against himself. The accused was subsequently convicted and sentenced to a term of imprisonment. On appeal, the Supreme Court held that the trial court erred in law by putting the accused in the witness box and compelling him to give evidence in his own trial contrary to section 22 (9) of 1963) constitution (now section 33 (11) of 1979 constitution).

m) **Right to be Tried Under a Precise Law**

Section 33(12) of the 1979 constitution provides:

> "A person shall not be convicted of a criminal offence, unless that offence is defined and penalty therefore is prescribed in a written law."

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[95] (1970) 1 AII NLR 69

The provision ensured that, no accused is convicted of an alleged offence unless there exists a law that clearly defines and states, all the ingredients of such offence and lays down a clear punishment for it.

The term "Written law: within the subsection, refers to an Act of the National Assembly or law of a state, any subsidiary legislation or instrument under the provision of a law.

Thus, where an accused person convicted of an offence under a non-written law, the defects is fundamental, and proceedings vitiated. In the case of AOKO V. FAGBEMI AND ANOTHER[96] The High Court quashed the conviction of the appellant by customary court, for the offence of committing adultery by living with another woman without judicial separation which was not provided for in any written law. The court held that, the conviction was contrary to the provision of Section 21(10) of the 1960 constitution, now Section 33(12) of the 1979 constitution.

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[96] (1961) ALL NLR 400.

This chapter highlights and classifies irregularities in two main heading, for instance, irregularities that cannot vitiate proceedings and those that can vitiate proceedings. So whether the mistake or error falls under Sections 379 or 380 of the Criminal Procedure Code, the important thing to consider, is whether the mistake or error occasions a failure of justice, before a proceeding will be set aside.

CHAPTER THREE

IRREGULARITIES IN ARREST AND SEARCH

This chapter is devoted to arrest, search and seizure. It discusses their legal position under the 1979 constitution, Criminal Procedure Code and Criminal Procedure Act. It also as a matter of necessity examines the provision of Police Act and some relevant decided cases. The topics to be discussed shall include, definition, grounds and manner of making arrest, irregularities and their effects.

3.1.1 Definition of Arrest

Oxford Advanced Learners Dictionary defined arrest as:-

> "To take and keep prisoner with the authority of the law."[1]

While Osborn's Dictionary defined it as:-

> "To deprive a person of his liberty by some lawful authority, for the purpose of compelling his appearance to answer

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1 Hornby, A.S. (1995) Oxford Advanced Learner's Dictionary fifth Edition, Oxford University press, p.56

a criminal charge, or as a method of execution.[2]

Similarly, Black's Law Dictionary defined arrest as:-

> "Taking under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand.[3]

Arrest is the common method by which an individual's liberty may be taken away. According to a learned author, arrest means "the deprivation of the liberty of one person by the act of another."[4]

Thus, an arrest therefore, for this purpose involves a lawful restriction on the movement of a person and deprivation of his liberty in order to compel him to answer a criminal charge.

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2 Lesilie, R and Sheila, B. (1993) Osborn's Concise Law Dictionary . Eight Edition, Sweet and Maxwell London p.31.

3 Henry, C. B. Ibid Note 7 at 109-110

4 Shani, B.M. (1988) Notes on Some Aspects of Criminal Procedure in the Northern States of Nigeria. A.B.U., Press, Zaria. P.54

As Coke, C.J. ones said,[5] "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison." Restriction of freedom of movement, must be total and not a partial one.[6]

It is a question of fact in each case, as to whether there was a restraint or not.

In AIGORO V. ANEBUNWA[7] the defendant had stood surety for a debt owed in Kano by the Plaintiff. The defendant believed that, the plaintiff intended to leave Kano without paying the debt, and he intercepted him at the railway station as he was about to board a train, saying that he would not let the plaintiff to go until he had settled the debt. The defendant then called a Policeman to assist him, and the plaintiff was invited by the Policeman to accompany him and the defendant to the charge office. The plaintiff complied, without being in any way physically touched. It was held by the High Court that, the Plaintiff had been falsely imprisoned,

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[5] Statute of West Minister 11, C.48

[6] See Bird V. Jones (1845)116. E.R 668.

[7] (1966)NNLR 87.

since it was clear from the evidence that, both the defendant and constable were determined that, the plaintiff should come to the Police Station and satisfied that, they were entitled to demand that, he came, whatever his own wishes might be, and even though his train was standing at the platform ready to move off.

3.1.2 Constitutional Provisions for Arrest

(a) Section 32(1) of the 1979 constitution provides:-

> "Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save, in accordance with a procedure permitted by law."[8]

The 1979 constitution does not define the words "procedure permitted by law" for the purpose of arresting an individual. However the procedure for arrest can be found in the police Act, and sections 26 - 46 and 56 - 66 of the criminal procedure code. Sections 26 - 38 of criminal procedure code, has provided a procedure as to when a police officer, private person and Justice of the peace, shall make an arrest without warrant for any person committing an offence in their present or

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8 Underlining supplied for emphasis.

reasonably suspected to have committed an offence. While sections 39 - 46 of criminal procedure code, deals with procedure, after an arrest of the suspected persons by the police officer, justice of the peace and private persons. And also, sections 56 - 66 of the criminal procedure code provides, procedures as how to compel appearance of an accused persons before the court and the procedure for issuing summons and warrant of arrest by the courts. However, section 4 of the Police Act, 1967 as amended by Act No. 23 of 1979, provides powers to police officers, when performing general duties, and also section 20 of the Police Act, empowered a police officer or may call any person to his assistance to arrest any person whom he finds committing any felony, misdemeanour or simple offence, without a warrant of arrest.

Failure to comply with the procedure laid down in arresting an accused person will amount to an infringement of his rights. For example, the accused should be released, if the charge was withdrawn against him.

In the case of JOSEPH ODOGU V. A.G.OF FEDERATION AND OTHERS[9] The appellant was arrested by the Police on 4th August, 1980 at Festac Town, and charged with the offence of armed robbery. He was taken into custody on 17th December, 1980, and further remanded by the Magistrate up to 1983. On 19th December, 1983 the charge against him was withdrawn by the prosecution, and the court struck out the charge and ordered his release. The learned Counsel for the appellant, claimed amongst others: (i) A declaration that, the applicant's constitutional guarantee for a fair hearing is being infringed (ii) damages and public apology. In assessing damages, the learned trial judge, despite his finding that, the appellant suffered pain, deprivation, indignity, emotional stress as well as disgrace and humiliation, he awarded the appellant only ₦2,000 (two thousand Naira only) for the whole period of his detention of 8 years. The appellant dissatisfied with the judgement, appealed to Court of Appeal, while the quantum of damages was increased to ₦75,000 (Seventy Five Thousand). He was dissatisfied and further appealed to

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[9] (1996)6 NWLR (PT.455) 508. See also Eda V. Commissioner of Police (1982)3NCLR 219.

Supreme Court. In allowing the appeal, the Supreme Court stated thus:-

> "The amount awarded by the trial court as compensation for the deprivation of the liberty of the appellant which is personal and sentimental impact as profound and grave was grossly too low.[10]

Section 32(1)(c) of the 1979 constitution states that, a person may be deprived of his liberty:-

i) for the purpose of bringing him before a court in execution of the order of a court.

A court may order the arrest of a person in various circumstances. For example if from information receives from any person other than a Police Officer it has reason to believe or suspect that, an offence has been committed.[11] The situation arose in the case of STATE V. CHARLES OKWUELE[12]

The accused was charged with the offence of setting fire to his own house contrary to Section 443(a) of the

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10 Ibid at 511

11 See S.143(e) of the Criminal Procedure Code.

12 (1967)10 ENLR 192

Criminal Code. The accused denied the charge and alleged that he and one Ojuke had a disagreement, that Ojuke was annoyed as the people present prevented him and the accused from fighting, that Ojuke boasted that the accused would never succeed in any criminal proceeding against him as he (Ojuke) had the backing of many an influential person and that it was Ojuke who set the accused's house on fire. The accused said he had reported the incident to the Police. However, the Police neither prosecuted Ojuke nor called him as a witness. Oputa, J., (as he then was) held that, where a witness whose evidence must have been conclusive one way or the other is not called, the trial court may refuse to convict. Accordingly, he entered an order for the acquittal and discharge of the accused person, while he ordered for the arrest and prosecution of Ojuke.

(ii) Upon reasonable suspicion of his having committed a criminal offence.

It is difficult to evolve a comprehensive definition of the term "reasonable suspicion". However, its meaning may be illustrated by reference to a few cases.

In the Indian case of QUEEN V. BEHARY SINGH,[13] Mavkby, J., declared:

> "What is reasonable suspicion must depend on the circumstances of each particular case, but it must be at least founded upon definite facts-tending to throw suspicion on the person arrested and not on mere vague surmise or information."

This definition was adopted in the case of SARKIN KINKIBA T. LADAN V. ZARIA N.A[14] A Police Constable was looking for the son of the accused in order to arrest him on suspicion of his having been concerned in a riot. The accused refused the Police Constable entry into his house to search for his son. When the Police Constable tried to force his way into the house, the accused resisted him. He was tried for obstructing and assaulting the Police Constable and was convicted. He appealed against his conviction. Acquitting the appellant, Hurley, C.J. declared that for an arrest to be lawful, there must be ground for such suspicion and such grounds on which he

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[13] (1967) 7WLR Cr.3

[14] (1962) NNLR 53.

suspected the appellant's son, the conviction of the appellant was illegal.

Similarly, the Indian case of SAIDINO V. EMPEROR[15]. It was held that "reasonable suspicion:" must relate to definite averments which the Police Officer must consider for himself before he acts.

(iii) to such extent as may be reasonably necessarily to prevent his committing a criminal offence.

In a situation where persons are suspected of conspiracy or preparation for the commission of an offence, arrest may be made to prevent them from committing the offence. For Example, under the provision of Section 26(g) of the Criminal Procedure Code, a person taking precautions to conceal his - presence in suspicious circumstances may be arrested.

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[15] AIR (1934) Sind 179. See also A.K. Okubule v. M.O. Oyeyipo FCA/K/40/79 Judgement delivered on 20th June, 1980 (unreported).

However, where the accused person has given a satisfactory account of himself, the Policeman's action cannot be justified.

In the case of JUSTIN LEMI AND OTHERS V. SUDAN GOVERNMENT,[16] a Policeman on duty in the market challenged the appellants who were crossing the market at 9.45pm. Each of the appellants disclosed his identity. One of them worked and lived within the market. An argument ensured between the appellants and the Policeman. The Policeman ordered them to go back as it was forbidden to work in the market area at that hour. The order was not obeyed, and a fight ensued. The appellants were arrested, prosecuted and convicted for assault and other imprecise offences. On appeal, the court held that because, the appellants had given a satisfactory account of themselves and their destinations, and because, none was found in suspicious circumstances, the Policeman's action was not justified.

(b) Section 32(2) of the 1979 constitution provides:-

> "Any person who is arrested or detained shall have the right to

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[16] (1963)SLJR 51.

remain silent or avoid answering any question until after consultation with legal practitioners or any other person of his own choice."

The effect of the Section is that, an accused person cannot be compelled to make a confessional statement.

In the case of OLUSHOLA V. A.G. OF THE FEDERATION AND OTHERS.[17] The Police arrested the Editor Mr. Sola Oyegbemi and the Senior Reporter Mr. Yemi Folarin. During interrogation by the Police,and despite Police pressure they refused to disclose the source of the news item and consequently they where charged with two (2) counts, one of which was, conspiracy to commit felony to wit "False Report." They brought an application in the High Court for the Enforcement of their Fundamental Rights under the 1979 constitution. They contended that, the press cannot be compelled to disclose the source of it's information. It was held that, no person be he an Editor, Reporter or Publisher of a newspaper can be

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17 (1982)3 NCLR 895.

compelled to disclose his source of information of any matter published by that person.

The right to silence was graphically claimed in JOHN LILBURN CASE[18] a student was indicted of High Treason (Disturbing the peace and Tranquility of the Nation and the Government). He requested during his trial, a counsel to be assigned to him in point of law, and thereby protested against his torture by the court of star chamber, which sought to extract a confession from him. He claimed that:-

> "No man's conscience ought to be racked by oaths imposed to answer questions concerning himself in matters criminal or pretended to be so..."[19]

In order to ensure that the police give accused the freedom to freely state what he wishes to say without compulsion, the judges rules were made in England in 1912. A similar body of rules were made by the then

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18 (1809) 4 Howell's State trials, 1294. Also see Miranda V. Arizona (1966) 384 U.S. 436

19 Ibid at 1294

Chief Justice of Northern Nigeria,[20] In exercise of powers conferred upon him by section 373(1) of the CPC, and they are called the criminal procedure (statement to police officers) rules.[21] The judge's rules may be summarised as follows:-

> "A police officer is entitled to question any person whom he thinks that, useful information may be obtained, and where he has evidence he should cautions that person before putting to him any questions. Where a police officer intend to charge or prosecute, a person shall be cautioned, and all written statements made after caution shall be recorded, either by the police officer or the suspect himself. In a situation warranting another person is to be charge on the same offence, a notice is to be made to the suspected person, and a true copy is to be handed over to him."

Strict adherence to the Judge's rule by the police will go a long way in curing any defect (major or minor)

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20 Mohammed, S.U. (1990) Admissibility of Confessional Statements:- Trial within Trial Paper presented at Nike LaKE Hotel Conference, held at Enugu. P.28.

21 (1960) NRNLR 106 of 1960

from the persistent problems coming before the courts where an accused person would always claim that the statement which the police wants to tender as his own is either not his or was obtained by duress.

It is a matter of regret and serious concern as the discussion in the case of STATE V. MATI AUDI, will later show that, the police are in the habit of violating the Judges rule and hence bringing about difficulty to the court in forcefully indulging in trial within trial.

What is essential in cases of this nature, as to whether a statement is or not contrary to the Judges Rules is that, the court before admitting the evidence, should be satisfied that the statement was really made voluntarily and was not prompted by any promise or inducement or threat or by actual violence.[22] For example, threat on accused person. Where an accused makes a confession as a result of physical violence or torture inflicted on him such a confession is involuntary and therefore inadmissible. This is an area most abused by the police. One gets a definite impression that

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22 See section 28 of the evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990.

physical abuse or it's threat are more often than not employed by the police.[23]

Usually when the prosecution seeks to tender the confessional statement, a lot of objections are raised by the accused person against admissibility. Where the accused person objects on the ground that it was made involuntarily, or that there was a threat or promise, that court has a duty to try the issue then and rule on whether to admit or reject the statement. This is what is called Trial within Trial. The purpose is therefore to determine whether the confessional statement was made voluntarily or not. In the case of DAWA AND MAIGIDA V. THE STATE[24] Obaseki JSC stated thus:-

> The question the trial court correctly considered in trial within trial was whether the prosecution had discharged the burden which should not and did not shift to the appellants of proving beyond reasonable doubt that the confession had been made in compliance with section 28 of the Evidence Law and the Criminal Procedure (statement to police officers) Rules and were

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23 Mohammed, S. U. Ibid Note 20 at p.15.

24 (1980) 2 NCR 38

therefore voluntary and admissible in evidence."[25]

The effect of threat or compulsion render the statement in admissible. In the case of THE STATE V. MATI AUDU[26] The accused had immediately before being taken to the police station in army lorry with an army escort, been beaten severely by soldiers for refusing "to tell the truth about what had happened between himself and the boy." At the police station, he made a confessional statement when he was still bleeding from his injuries. Wheeler CJ (as he then was), held that the statement was inadmissable as, what happened at the barracks and what followed at the police station must be regarded as one continuous transaction and not as separate and distinct incidents... Nothing was done at the police station by way of assuring the accused that he need no longer fear physical violence if he chose not to say anything.

The procedure for trial within trial is this. The defence raises an objection to the admissibility of the

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25 Ibid at 39

26 (1971) NNLR 91

c) Section 32(3) of the 1979 constitution provides:-

> "Any person who is arrested or detained shall be informed in writing, within 24 hours of the facts and grounds for his arrest or detention."

Thus, it is for a Police Officer or any person, to inform a person arrested of the particulars of the offence to which he is charged.[28] However, the current practice adopted by Nigerian police, do kept the suspected person or an arrested person in the cell, without informing him the nature of the offence committed for days or even months. By so called exercising discretionary powers of police officers, under Police Regulations.[29]

d) Section 32(4) of the 1979 constitution provides that, any person who is arrested or detained for an offence shall be brought before a court of law within "a reasonable time."

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28 See Olushola V. A.G. of the Federation and others Supra Note 17.

29 See section 6 of Police Regulations, 1968

It is not easy in a nutshell to give a definition of the expression "reasonable time." However, we may content ourselves with the description of this very expression as contained in Section 32(4) of the 1979 constitution. It provides that, the expression "reasonable time" means a period of one day, in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometers, and two days or any longer period in any other case.

Thus, the emphasis here is on the production of the accused person before a court as soon as practicable. There are often strong indications that arrested persons are kept in Police custody for several days or even weeks or months before they are taken to court.

In the case of JOHN FALADE V. ATTORNEY GENERAL OF LAGOS STATE.[30] The appellants was arrested and detained by the Police on 8th September, 1980 at the Ikeja Police Station on suspicion of armed robbery. Two weeks later, he was transferred to Panti Police Station where he was detained until 27th October, 1980 (48 days after arrest).

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30 (1981)2NCLR 771. See also - Oluka V. State (1981) 2 PLR 323.

He was then taken before a Chief Magistrate Court where he was charged with armed robbery. No plea was taken because the Chief Magistrate lacks jurisdiction to hear and determine the case. He was again remanded in prison custody until 6th January, 1981 (184 days after arrest). This was when his counsel applied for an order for his release on the grounds that his fundamental rights as guaranted by Section 32 of the 1979 Constitution had been infringed. Balogun, J., released him and lamented at the serious departure from the constitutional provisions.

Section 32(4) of the 1979 Constitution further provides that, if an accused person is not tried within a period of:-

a) 2 months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail, or

b) 3 months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

The effect of this section means that, bail to an accused person is aright, he can be released on conditions which are reasonable to ensure his subsequent appearance for trial.

In the case of ONU OBEKPA V. COMMISSIONER OF POLICE.[31] The applicant who gave evidence on oath in support of his application for bail before the Otukpo Grade II Magistrate Court was refused bail on the ground that his release on bail will prejudice the investigation into the offence of theft against him and other suspects supposedly at large. The Police Prosecutor made his allegation of Prejudice orally before the court and did not give circumstances or any other elaboration to substantiate it and this against the undertaking by the applicant on oath that, he will not interfere with investigation. In the application before the High Court, the applicant made similar undertaking that, he will do nothing to interfere with the investigation into the case if released on bail. It was held that, the provision in Section 32(4) (a) and (b) of the 1979 Constitution is to keep an accused person out of incarceration until found guilty through the process or court trial. It is a

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31 (1981)2NCLR 420.

conditional privilege which he is entitled to under the constitution. Application allowed, bail was granted.

The constitutional powers of the police to detain any person is based upon reasonable suspicion" of his having committed a criminal offence or for the prevention of such person from committing a criminal offence.[32] Thus there is provision for the police to detain any person on a "mere suspicion". Moreover, if such detention becomes necessary the police is expected to take such a person to court within a period of one day or at most two days.[33] Therefore the detention by the police of any person on a mere suspicion or for a period exceeding one or two days as the case may be, is unconstitutional. The continued deficiency of this constitutional provision by the police with impunity is largely because the civil society is not a well informed and enlightened one. These incidences may be succeeded if enlightenment programmes will be undertaken. For certainly if the people are aware of their fundamental right to liberty and are ready to have it enforced, it will go a long way in reducing the incidence of violating this constitutional provision.

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32 See Section 32(1)(c) of the 1979 Constitution.

33 See Section 32(5) of the 1979 Constitution

It is a matter of regret that some magistrates and Area Court Judges are in the habit of remanding suspects, who are ordinarily entitled to bail on flimsy excuses. So far the only remedy readily available to a person who is entitled to bail, but was refused is to apply to the High Court under section 342 of the Criminal Procedure Code to be released on bail and for compensation and apology.[34]

3.1.3 Grounds of Arrest

The grounds upon which a person may be arrested are:

i) there must be an act, which constitutes an offence, at the time of arrest.

ii) There must be reasonable belief that, the person had committed an offence at the time of arrest.

The test was to what is "reasonable belief." It is not what the Policeman himself considered reasonable but, whether the facts within the knowledge of the Policeman at the time of arrest disclosed circumstances from which it could be reasonably inferred that the person had committed an offence. If the arrest preceded the act,

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34 See Section 32(6) of the 1979 Constitution

such arrest is unlawful. In the case of FELIX CHUKWUKU V. COMMISSIONER OF POLICE[35] The appellant was tried in the Magistrate's Court and convicted of disturbing the public peace and resisting lawful arrest, and assaulting a Policeman. At about 8.00pm there was a dance at the Hotel Horizontal, where appellant was one of the guests. He was drunk and was staggering, fell on loud speaker. Speaker stopped functioning, people started gathering round the accused, who was lying on the loud speaker. Cpl Bello after seeing the disturbed atmosphere, approached the accused, introduced himself as a Policeman and arrested him. He asked him to go to the Police Station. The accused offered resistance. He then pushed Cpl Bello against the wall who sustained a head injury. The question that arises on the conviction under Section 267 of the Penal Code, is whether or not the policeman was acting in the execution of his duty in inviting the appellant to the Police Station, or arresting him as the case may be before he was assaulted. A. smith, S.P.J. stated thus:-

> "We think that answer to that question is in the negative - because, the hotel being a private place, no

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35 (1964) NNLR 21, See also K.V. Muhammad v. Ayyanbkannan AIR (1948) Mad 218

> offence had infact been committed, nor did the evidence for the prosecution disclosed facts upon which it was reasonable to believe that, the appellant had committed an offence under Sections 113 or 402 of the Penal Code. We quash all the convictions and set aside all sentences. Fine imposed on the first and second convictions are to be refunded if paid." Appeal allowed.

3.1.4 Manner of Arrest

The criminal procedure code provides in section 26 - 30 for the persons who can effect an arrest on a suspected persons. For example, section 30 of the criminal procedure code provides:-

> "Any Justice of the peace or superior police officer may at any time arrest or direct the arrest in his presence of any person for whose arrest a warrant might lawfully be issued."

The criminal procedure code did not provide as to how and manner an arrest can be effect. However, in practice in making an arrest the police officers or any other person may actually touch or confine the body of the person arrested. This is in consonance with section

3 of the criminal procedure Act. Therefore in the absence of such provision in the C.P.C., it is desirable to have it amended so as to include such important provision.

Thus, for an arrest to be made, the person making the arrest, must touch or confine the body of the person arrested.

An arrest cannot be effected by mere words, the person to be arrested must actually be touched or his body confined.

In the case of SADIO V. THE STATE.[36] The accused was invited by a Police Officer to the Police Station for questioning over the commission of an alleged offence. The accused refused to accompany the Police Officer to the station. Other officers were sent to the accused and he was eventually persuaded to accompany them to the Police Station. The accused was charged and convicted inter-alia with the offence of resisting police arrest. On appeal against conviction, on the charge of resisting police arrest, the appellate court held that the

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[36] (1982)2 NCR 142.

appellant was never arrested by the Police Officers because, there was no restraint of the appellant. Mere words cannot constitute an arrest under the law, unless accompanies by some form of restraint. Therefore since there was no arrest in law, the appellant could not have resisted arrest, and the appeal was therefore allowed.

It is important to note that, the current practice by the Nigerian police force, in arresting an armed robber in operations, is usually by over powering him. The arrest cannot be possible by touching or confinement of the body, as provided under the law. The police officer has to disarmed the robber, by exchanged of gun shooting before effecting the arrest.

In effecting arrest, it is mandatory to notify the person arrested the course of his arrest, unless where the person arrested was in the actual course of committing the offence or was pursued after the offence was committed or was escaping from lawful custody, he need not be informed of the course of the arrest.[37]

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37 See Section 38 of the Criminal Procedure Code.

In the case of CHRISTIE V. LEACHINSKY.[38] The police, Chrite and Morris arrested Leachinsky without a warrant when they had reasonable ground for suspecting that he had stolen and received a bale of clothes. He was arrested for unlawful possession of the clothes under search and detain section of the Liverpool corporation Act 1912, though in the circumstances, the Act gave them no power to arrest without warrant. Thus the arrest was unlawful. moreover the police officer failed to tell Leachinsky why he was arrested. He was detained in the police station till the next day when he was charged to court. The court remanded him for two weeks in custody. Subsequently at his trial he was acquitted. Leachinsky then brought an action for false imprisonment against the police officers, Christie and Morris. The House of Lords, Viscount Simon stated thus:-

> ... the requirement that, the person arrested should be informed of the reason why he is seized naturally does not exist, if the circumstances are such that, he must know the general nature of the alleged offence for which he ((sic) detained... The person arrested cannot complain that, he has not been supplied with the above

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38 (1949) A.C. 573.

> information as, and when he should be, if he himself produces the situation which makes it practically impossible to inform him for example by immediate counter attack or by running away..."[39]

Section 32(3) of the 1979 constitution has laid down, as to how an accused person arrested should be treated. For example, an arrested person should be informed the particulars of the offence within a reasonable time or at the point of arrest. The practice of our police force in this regard has been to invite the suspect to the police station, where upon he is informed the reason for his arrest. According to Assistant Superintendent of police Abdullahi, M[40] this method is expedient in order to avoid a clash between the police and persons who at the time of the arrest may be present, most especially the members of the arrested person's family.

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39 Ibid at 587 - 588

40 Nigeria Police Headquarter Katsina - (C.I.D. Branch).

3.1.5 Arrest with Warrant

A warrant of arrest is an authority in writing by a court to a Police Officer or any other person to arrest an offender.[41]

Section 56(1) of the Criminal Procedure Code provides:-

> "Every warrant of arrest issued under this Criminal Procedure Code, by a court or Justice of the Peace shall be in writing, signed or sealed by the court or the Justice of the Peace.

By this provision, for a warrant to be valid, it must be in writing, duly authenticated by the person who issued it, and the particulars should be stated. For example, the name of the person to be arrested, must be clearly written.

In the case of RE-SAGAVMALKHEMRAJ AND ANOTHER[42] Arrest warrant against petitioners were addressed to the "O/C concerned" and referred to the two applicants merely by their names. Beavmount, C.J. stated thus:

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41 Mwadialo, F. (1987) The Criminal Procedure of the Southern States of Nigeria, Professional Publishers Ltd., Ebute Metta Lagos. P.77

42 AIR (1940) BOM 397

> "In my opinion, the warrants are clearly bad. They are addressed to the "O/C concerned", "O/C" might stand for "officer commanding or "Officer in charge"," but as no indication is given as to what the command or what charge is referred to, and words really mean nothing. on this formal grounds, I think that, the warrants are invalid, and I think they are further invalid because, they do not sufficiently specify the persons to be arrested."

The court must receive a complaint on oath or by a material witness, before issuing the warrant of arrest.

In the case of IKOME V. COMMISSIONER OF POLICE.[43] The chairman of a Judicial Commission of Inquiry, a High Court Judge, received a letter containing serious allegations against the appellant. On strength of the letter, he issued a warrant of arrest against the appellant. The appellant filed an application to have the warrant set aside. On appeal to the Court of Appeal, the appeal was dismissed. On further appeal to Supreme

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43 (1986) 4 NWLR 473.

Court, the Court held that, the warrant of arrest was improperly issued for the following reasons:-

1. It was issued by the Judge in his capacity as Chairman of the Judicial Commission of Inquiry and not in his capacity as a High Court Judge.

2. It was issued by him without receiving a complaint on oath against the appellant. Thus, the appeal was allowed.

A fresh warrant of arrest has to be issued to effect a subsequent arrest or to re-arrest an offender.

In the case of R V. AKINYANJU.[44] A warrant of arrest was issued for the arrest of the accused. It was executed on him and he was duly arrested. Subsequently, he was discharged. However, he was subsequently re-arrested on the same warrant of arrest. The court held that, the subsequent execution of the warrant of arrest, which had been earlier executed was irregular.

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44 (1959) WRNLR 253

KASHIM IBR...

3.1.6 Arrest Without Warrant

Section 26 of the Criminal Procedure Code provides thirteen circumstances under which a Police Officer may arrest without warrant in the following:-

a). Any person who commits an offence in his presence.[45]

As a general rule, the word "presence" means, the sense of perception. For instance, if a Police Officer smells Indian Hemp from behind the locked door of a house, it can be said that, the offence has been committed in his presence.[46]

The criminal procedure code, laid down that, all search being conducted on private residents of a suspect, must be by search warrant duely authorized by the court.[47] However, where the offence is committed in presence of police officer he may effect an arrest. More over, in cases where suspects were taken Indian Hemp in a certain house, that will amount to committing the offence in the presence of the police officer. Thus a police officer may enter such a house without a warrant.

45 See Section 10(1)(b) of the Criminal Procedure Act and S.20(1) of the Police Act, 1967.

46 Shani, B.M. supra Note 4, at 57

47 See section 74, 76 and 78 of the criminal Procedure Code.

b) Any person for whose arrest a warrant has been issued or when he is directed to arrest by a Justice of the Peace or superior Police Officer under Section 29 or Section 30.[48]

Where a court issues a warrant of arrest on a suspect, a police officer may effect an arrest, even though at the time of arrest he is not in possession of the warrant, but later the warrant should be shown to the person arrested as soon as possible.

c) Any person, who has been concerned in an offence for which in accordance with the Criminal Procedure Code or under any other Act or Law for the time being in force in any part of Nigeria the Police may arrest without warrant or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exist of his having been so concerned.[49]

The term "reasonable suspicion" has not been defined by the Criminal Procedure Code. However, the test to be adopted in determining whether the Police Officer acted

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48 See Section 10(1)(h) of the Criminal Procedure Act.

49 See Section 10(1)(a) of the Criminal Procedure Act.

within his power is objective. In other words, from the facts of the case, could it be reasonably inferred that, the commission of an indictable offence has been disclosed.

In the case of JACKSON V. OMOROKUNA.[50] The Plaintiff and O were dragging a motorcycle in a high crime area at night. The defendant a Police Officer demanded from them the particulars of the motor cycle and the ignition key. When these could not be produced, he arrested them and took them to the Police Station, detained them, but they were subsequently released. The Plaintiff brought an action against the defendant for unlawful arrest and false imprisonment. On the Plaintiffs action based on unlawful arrest, the High Court held that,the defendant had reasonable grounds in suspecting that, the plaintiff had stolen the motorcycle, since they could not produce the particulars of the motorcycle and they did not explain the whereabouts of it's ignition key. The arrest was lawful Iguh, J (as he then was) observed that:-

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50 (1981) 1NLR 283. See also Commissioner of Police V. Oboio (1989)5 NWLR 130.

> "The power possessed by the Police Constables to arrest without warrant, whether at common law for suspicion of felony or under statutes for suspicion of various misdemeanors is subject to the requirement that, the constable shall before arresting satisfy himself that, there exists in fact reasonable grounds for suspicion of guile. the test to be applied, with the onus of proof on a defendant seeking to justify his conduct, must be that of a reasonable person acting without passion or prejudice. The matter must be looked at objectively, and in the light of the facts known to the defendant at the time, not on facts that may subsequently come to light.[51]

Similarly, the case of WILTSHIRE V. BARRETT.[52] The respondent was arrested without a warrant of arrest by the appellant, a Police Officer. The respondent was arrested for driving while under influence of alcohol, the arrest being effected by force because, the respondent did not submit himself voluntary to the Police. In consequence he sustained some bodily injuries. After the respondent was examined by a doctor,

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51 Ibid at 296 - 297.

52 (1965)2 AII ER 271.

it was revealed that, the respondent was not under the influence of alcohol at the time he was arrested and he was released. The respondent brought an action against the Police Officer claiming damages for assault and unlawful arrest. Lloyd Jones, J (Winchester Assizes) awarded damages to the respondent. On appeal against the decision of the lower court, the English Court of Appeal, in a unanimous decision, allowed the appeal. It held that, if it appeared to the Policemen that, the respondent was driving under the influence of alcohol, even though subsequent investigation revealed that, at the time he was arrested, this was not actually the case, the arrest remains lawful. Lord Denning observed as follows:-

> "The Police have to act at once, on the facts as they appear on the spot, and they should be justified by the facts as they appear to them at the time and not on any expose facto analysis of the situation .... In all the many cases where a statute gives power to arrest when a man is "committing" or "found committing", that is apparently committing an offence.[53]

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53 Ibid at 274 - 275.

A hasty action by the Police Officer or any person, may make him liable for unlawful arrest. This situation arose in the case of A.K. OKUBULE V. M.O. OYEPIPO.[54] Mr. Okubule, a Chartered Accountant was travelling in his Volvo car No. LSA 1565 towards Kaduna, Mr. Oyeyipo, Permanent Secretary to the Kwara State Government, at Pandogari ordered two Policemen to arrest Mr. Okubule (appellant) and his driver on the ground that, the Volvo Car in which they were riding had been stolen from his possession. Mr. Okubule there and then produced the particulars of his car. But Mr. Oyeyipo (dependant) still insisted that, he should be arrested and taken to the Police Station at Birnin Gwari. At the Police Station Mr. Okubolo was put behind the counter and his driver was locked up in the cell. Although the dependent could not tell the chassis number, the engine number and the registration plate number, yet he claimed that, the colour, the chrome missing from one side of the car, and the broken rear light were the features of the car stolen from his possession and same features were noticeable on the car in appellant's possession. The police told Mr. Oyeyipo that, this was not sufficient to identify the stolen car. Thereupon, he moved closely and

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54 FCA/K/40/79 Judgement delivered on 20th June, 1980 (unreported).

examined the car. Finding an air-conditioner in it, he became convinced that, the car was not his. So he told the Police to release Mr. Okubule and his driver, at about 10.30pm. Mr. Okubule sued Mr. Oyeyipo before the High Court of Justice of Ilorin for causing his unlawful arrest and false imprisonment. The court held that Mr. Oyeyipo had a reasonable suspicion, suspecting Mr. Okubule and his car, and the arrest was lawful. Therefore the trial court dismissed the claim and awarded costs to Mr. Oyeyipo. Mr. Okubule appealed against the decision to the Federal Court of Appeal. Allowing the appeal and awarding ₦2,000.00 by way of damages. Adenekan Ademola, J.C.A. said:

"It is my view that, the arrest and false imprisonment of the appellant began from the Pandogari village and not at Birnin Gwari Police Station because, the evidence disclosed that, right from that spot the appellant had no choice in his movement, as he was under that, he was unable to continue his journey after his arrest had been found to be unlawful, considering the night he was subsequently released from the unlawful arrest."

d) Any person the order for whose discharge from prison has been cancelled by a Judge of the High Court under Section 99.

Thus, a Judge of the High Court may revoke the order made by him, for the release of person imprisoned for failure to give security for keeping the peace or to be of good behaviour. For example, the release may have been conditional and the condition was breached or it may be discovered that, the person released is infact a hazard to the public.[55]

e) Any person whom he reasonably suspected to be "designing:" to commit an offence for which the police may arrest without a warrant, if it appears to him that, the commission of the offence cannot be otherwise prevented.[56]

The Criminal Procedure Code has not defined the term "design", however, it may be said that, it lies some where between a bare intention and an attempt.[57]

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55 See Section 99(4) of the Criminal Procedure Code.

56 See Section 55 of the Criminal Procedure Act.

57 Shani, B.M. Ibid Note 4 at 59

According to the learned author,[58] suggest that, it will appear to include the planning before the attempt is started.

The test under this sub-section is substantive as, what did the Police Officer actually think at the time the arrest was made. If he thought that, the only way in which the offence could be prevented was to make an arrest, then the arrest would be lawful.[59]

However, where the police acted unreasonably he may be liable for unlawful arrest.

f) any person required to appear by a public summons published under Section 67 of the CPC.

Thus, the High Court Judge may publish a public summons, only after a warrant of arrest has been issued, and the person absconded or concealing himself, so that such warrant cannot be executed. As soon as this summons

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58 Richardson and William, The Criminal Procedure Code of the Northern Nigeria sweet and Maxwell Lagos, African Universities press. p.50

59 Shani, B.M. Ibid at 59

is published, a Police Officer is empowered under this sub-section to arrest without a warrant.

g) any person found taking precautions to conceal his presence in suspicious circumstances or who being found in suspicious circumstances has no ostensible means of subsistence or cannot give a satisfactory account of himself.[60]

The standard of "ostensible" means of subsistence is a very elusive one. It is too vague to be a good standard to guide Police Officer.[61]

Moreover, being the moral duty of a state to provide means of subsistence to it's own citizen, it seems strange that, he should be put to further difficulties for not having ostensible means of subsistence.[62]

h) any person in whose possession property is found which may reasonably be suspected to be stolen

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60 See Section 10(1)(J) of the Criminal Procedure Act.

61 Okonkwo, C. O. (1966) The Police and Public in Nigeria, Sweet and Maxwell, London p.16

62 See Justice Lemi and Others V. Sudan Government Supra, note 16 at 65.

property or in respect of which an offence of offering or receiving gratification by public servants or who may reasonably be suspected of having committed an offence with reference to such property.[63]

This provision, empowers a Police Officer to arrest any person who commits any of the offences above, even though the criminal procedure Code provides that, such an offender shall only be arrested with a warrant. The justification,it seems to be that, the possession of stolen goods is itself an offence, and thus an offence is being committed in the presence of the Police Officer.

A third party benefiting from the offence committed under the above offences, may also be subject to arrest. However, it is doubtful, if an innocent beneficiary can be convicted by any court.

i) any person who obstructs a Police Officer,while executing his duty.[64]

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63 See Section 10(1)(d) of the Criminal Procedure Act.

64 See Section 10(1)(c) of the Criminal Procedure Act.

Thus, a police officer is a person employed to enforce laws on the community, while a public servant is a person whom owe a duty to the community. A police officer is accorded more immunity or protections under the law, than a public servant, in case there is an action claiming damages.[67]

j) any person who has escaped or attempted to escape from lawful custody.

That is, if a person is lawfully arrested escapes, a Police Officer may -re-arrest him, without a warrant of arrest. For example, a Warder from whose hands a prisoner escapes.

k) any person reasonably suspected of being a deserter from any Military Force for the time being serving in Nigeria.[68]

Thus, where the Police Officer reasonably suspects that, a person left the Military Service, without being discharged by the authority, may arrest such a person without a warrant of arrest.

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67 See Wiltshire V. Barret Supra Note 52

68 See Section 10(e) of the Criminal Procedure Act.

l) any person who in his presence has committed or been accused of committing any offence for which the Police may not, according to the Criminal Procedure Code, arrest without a warrant, if on his demand, such person refuses to give a name and address or give a name and address which he believes to be a false one.

Refusing to give his "name and address" may mean, a person hiding his identity for the purpose of committing an offence.

m) any person failing to obey a direction of the Governor issued under the Criminal Procedure Code .

Thus, where a person breaches any of the conditions directed by the Governor. The Police Officer may arrest him without a warrant.

3.1.7 Person Who can Effect Arrest

The Criminal Procedure Code authorizes the following persons to effect an arrest:-

3.1.7(a) Police

The Criminal Procedure Code and the Police Act, specify the grounds on which a Police Officer may arrest. For example, section 4 of the Police Act 1967, as amended by Act No. 23 of 1979, the Police are charged with the following general duties:-

a) The prevention and detection of crime,

b) The protection of life and property,

c) The apprehension of offenders,

d) The preservation of law and order,

e) The due enforcement of all laws and regulations with which they are directly charged and

f) The performance of such military duties within and without Nigeria as may be required of them by or under the authority of any Act.[69]

Thus, a Police Officer may effect an arrest on any offender, in the cause of performing the above general duties.

3.1.7(b) Private Person

A private person includes any person other than a Police Officer or Justice of the Peace.

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69 Ehindero, S.G. (1986) Police and the Law in Nigeria, Time Press, Apapa Lagos, P.10-11.

Section 28 of the Criminal Procedure Code , specifies grounds on which a private person may effect an arrest:-

a) any person for whose arrest he has a warrant or whom he is directed to arrest by a Justice of the Peace or Superior Police Officer.

b) any person who has escaped from his lawful custody,

c) any person required to appear by a Public Summons,

d) any person committing in his presence an offence for which the Police are authorized to arrest without a warrant.

It will be very difficult for a private person to know "when a Police are authorized to arrest without a warrant" because, of the lack of knowledge of the contents of the Criminal Procedure Code .

A private person may face possible proceedings for false imprisonment.

In an Indian case of NAZIR V. REX.[70] Armed robbers entered a village at night, were discovered and chased after a shout and cry was raised. Some of the men followed the tracks of the robbers for six miles, had not personally seen the commission of a crime. The robbers shot at them with pistols, where upon persons from another village joined the chase. The robbers were caught and on trial raise defence that, the arrest were unlawful. Dismissing their contentions, Bund Basni, J... held that;-

> There is no express provision any where in the code of criminal procedure in regard to the aid to a private person in arresting an offender. However, it is worthy that, the words in his presence in S.28 of the Criminal Procedure Code , give a much clearer authority to private person than the words in his view used in S.159 of the Indian Code of the Criminal Procedure. In the sense that, a private person who is attempting to arrest a person under Section 28 of the Criminal Procedure Code , may under S.31 of the Criminal Procedure Code , use all means necessary to arrest such person;

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70 AIR 1951 AII 3.

> including taking of help from other private persons who might not have been present, while the offence was being committed.

Similarly, in the Indian Case of ABDUL AZIZ V. EMPEROR.[71] Rowland, J.

> "... It is popularly believed that a private person is entitled to arrest not only a criminal who seen in the act of doing the crime, but one who seen in the act of flight immediately after."

Equally the case of JOHN LEWIS V. TIMES.[72] The appellant was held liable for the false imprisonment of the respondent. The respondent and her daughter had been arrested by the private detectives of the appellant company for stealing from the store. They were taken before the Chief Store detective and the managing director of the company, and were detained for some time. The evidence of the respondent's daughter was that, they were detained for an hour. They were subsequently handed over to the Police. The House of Lords in allowing the appeal, held that where a person in the exercise of his

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71 AIR (1933) Pat 508.

72 (1952) AII ER 1203.

common law right arrested a person without a warrant, he should take the person arrested before a Justice of the Peace or a Police Officer, not necessarily forthwith, but as soon as reasonably possible. In the instant case, the taking of the respondent to the appellant's office to obtain authority to prosecute from the managing director was not an unreasonable delay before handing them over to the police. Thus the appellants were not liable for false imprisonment.

3.1.7(c) <u>Justice of the Peace or a Superior Police Officer</u>

Section 30(1) of the Criminal Procedure Code provides:-

> "Any Justice of the Peace or superior Police Officer may at any time arrest or direct the arrest in his presence of any person for whose arrest a warrant might lawfully be issued.[73]

Thus, the directions would normally be given orally because of the arrest being made in the presence of the Justice of Peace or the Superior Police Officer.

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73 See section 16(1) of the Criminal Procedure Act.

Who is a Superior Police Officer? The Criminal Procedure Code , offers no definition. However, section 2 of the Police Act 1967, defines a "Superior Police Officer" as:-

> "Any Police Officer of or above the rank of Cadet Assistant Superintendent, and includes Chief Officer and a deputy Chief Officer of a Police Fire Brigade."

3.1.8 **Irregularities in Arrest**

Any arrest which has not conformed with the rules and regulations which empower a Police Officer, private person or justice of the Peace, may amount to an irregularity. For example, a person who is arrested without warrant of arrest, where the law requires warrant, is an irregular arrest.

In the case of OKOTIE V. POLICE.[74] The accused was arrested without a warrant of arrest and arraigned for conspiracy to bring false accusation and stealing. He was convicted of both offences. He appealed against conviction, on the ground that, his trial and conviction

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74 4 FSC 125

were a nullity because, the provisions of the section creating the offence of conspiracy to bring false accusation, which requires an offender to be arrested with a warrant of arrest were not complied with. The court held that, the arrest was unlawful.

3.1.9 Effect of Irregularities in Arrest

Section 382 of the Criminal Procedure Code provides:-

> "No finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the complaint, summons, warrant, public summons, order, judgement or other proceedings under the Criminal Procedure code, unless the appeal court or the reviewing authority thinks that a failure of justice has infact been occasioned by such error, omission or irregularity."

The effect of the section is that, the illegality of an arrest has no effect on the jurisdiction of the court, to hear and determine the case. The attitude of the courts in this regard was aptly stated by Hawkins, J.,

when he held in the case of R.V.HUGHES[75] that where a defendant had been arrested and brought before the justices "upon as illegal a warrant as ever was issued" as Hawkin, J. put it, the Justices had jurisdiction to hear the charge. This case was decided upon the common law and English statutes.

In the case of E. OHIMEOKPU V. C.O.P.[76] a Magistrate Grade I convicted the appellant on three counts, two under the West African currency Notes Ordinance (Cap. 230) for possessing and uttering a forged five pound note and the third for destroying evidence contrary to Section 123 of the Criminal code. Since section 123 of the criminal Code, provides that, the offender cannot be arrested without warrant, and no warrant was issued for the arrest of the appellant, it was argued on appeal that, the arrest of the appellant without warrant vitiated the trial. But delivering the judgement of the court, Hurley SPJ, applied the provision of Section 382 of the Criminal Procedure Code and held that, the illegality did not vitiate the trial.

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75 4 QBD 614 (1879) (cited in Emmanuel Ohimiokpu V. C.O.P. (1959) NRNLR 1 at 3.

76 Supra Note 75.

Similarly, in an Indian case of EMPEROR V. VINAYAK[77] Scott, C.J. stated that:-

> "... where a man is charged before a Magistrate with an Offence,under the Penal code, it will not avail him to say that, he was brought there illegally.."

This clearly shows that, the non-endorsement of the warrant is a mere irregularity which cannot vitiate the proceedings, unless the court thinks that it has occasioned a failure of justice, which has not been shown in the instant case.[78]

3.1.10 Remedies Available to Illegally Arrested Person

Section 371(1) of the Criminal Procedure Code provides:-

> "When any person causes the arrest of another person and it appears to the court by which the case is inquired into or tried that, there was no sufficient ground for causing such arrest, the court may in it's discretion direct the person causing the arrest to pay to the arrested

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77 ILR 35B (1911).

78 See Mattaradona V. Chief Magistrate (1995) 8 MWLR (PT.412) 225.

person such and may award a term of imprisonment in default of payment."

The compensation awarded under this section is in the nature of fine and the court may award a term of imprisonment in default of payment.

Similarly, section 32(6) of the 1979 Constitution provides:

> Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person.

The term "appropriate authority or person" means an authority or person specified by law. A person unlawfully deprived of his liberty, can sue for false imprisonment and the remedy available to him is for compensation and apology. In some cases, there seems to be non-compliance by the authority, for example the police failing to pay compensation or refusing to tender apology. Where this happen, the police may be charged for contempt of court order.

The term "false" here signifies wrong and "imprisonment" is not restricted to locking a person up

in a prison. It includes the mere deprivation of liberty whenever it occurs. The tort of false imprisonment is not confined to unlawful action by Policemen, it includes unlawful action by private persons.

A person could be unlawfully imprisoned without his knowledge.

An English case of MEEVING V. GRAHAM WHITE AVIATION LTD.[79] The court of Appeal held that, a man was falsely imprisoned when he was kept in an office under pretence of his evidence being needed, there being men stationed outside the door to prevent his escape, even though he did not realise that he had been deprived of his liberty.

There is need sometime to search a person, who is arrested because, he may be carrying the property of the subject of the arrest or the property that may be exhibited before the court. And in some cases person arrested may hide the property of the subject of the arrest in his house and therefore, there is need to search his house. Generally speaking, searching an arrested person or his premises is an infringement of his

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79 (1919)122LT44.

constitutional privacy, but this is allowed by the law, in the following circumstances. For example, Section 44 of the Criminal Procedure Code provides:

> A Police Officer making an arrest or receiving an arrested person from a person by whom the arrest has been made, may search the arrested person or cause him to be searched.[80]

3.2 Irregularities in Search and Seizure

Irregularities may be classified into three categories as follows:

a) Search with Warrant Wrongly Obtained

The search warrant is said to be wrongly obtained, where a Judge or Magistrate issued without making "Judicial Inquiry."

The term "Judicial Inquiry" has not been defined, but it can be understood, as to whether the step is really necessary in the end of Justice, should the court issue a search warrant.[81]

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80 See Section 6 of the Criminal Procedure Act.

81 Sohonis (1973) The Code of Criminal Procedure 17th Edition Sardav Petal Marg Post Box 4 Allahdad, p.247.

Thus , it means that, a warrant will be invalid if the Judge or Magistrate issues it without considering these points. For example, (i) without examining the Police Officer on Oath (ii) The court must satisfy that the document or thing for which a warrant of search is being requested is connected with an offence, and that such document or thing is likely to be found in the place indicated.

It should be noted, the Police Officers usually demand for the issuing of the search warrant,but they have to satisfy the court with all relevant information, before the court can issue the search warrant.[82]

It should also be noted that, it is wrong for magistrate or Area Court to sign a blank warrant to the police officer. He must be satisfied on the information given to him by police officer before search warrant is issued. Moreover the search warrant must be directed to the named person, place and reason for the search. The issuance to unnamed search warrant by the magistrate or Area Court Judge to the police officer amount to abuse of Judicial process, where such can be established liability

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82 See Section 75 of the Criminal Procedure Code.

will solely lay on the issuing magistrate or Area Court Judge. S. 377(1) of the criminal procedure Code notwithstanding, for the section protects actions of Judges and magistrates who exceeds their jurisdiction in good faith believing to have jurisdiction so to do. How can a Judge and magistrates or Area Court Judges deliberately issue unnamed search warrant to a police officer, and to say that he has done that in good faith.? In fact the issuance of unnamed search warrant to a police officer amount to gross irresponsibility, and since it does not comply with the provision of the law for issuance of the same, it cannot be said to have been done in good faith. It is flagrant abused of court process. Therefore the issuing magistrate or Area Court Judge should be held personally responsible for the resulting consequences. For example, the violation of citizen right to private and family life and the possible illegally removal of any items as a result of such exercise.

It is submitted that, magistrate courts and Area Court Judges who are involved in this type of Judicial misconduct should be reported to the Judicial Service Commission for the necessary disciplinary actions.

b) Search Without Warrant

Where search is to be made for document or things as contemplated in section 74 and 76 of the Criminal procedure Code, search of premises without a valid search warrant is illegal.

However, a Police Officer may conduct a search of a thing which he reasonably believes contains any thing unlawful, without a search warrant. For example, Section 25 of the police Act 1967 provides:-

> A Police Officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which has reason to believe have been stolen or otherwise unlawfully obtained.

The effect of the provision, empowers the Police Officer to prevent and detect the commission of crime.

A Police Officer may search a vehicle, on reasonable ground without a search warrant, for any stolen goods. In the case of CAROL V. UNITED STATE[83] Two persons driving a car containing illegal liquor were stopped by the Police and their car was searched, it was held that,

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83 167, U.S. 132, 69 L.Ed. 543

this search was not illegal. The court based it's decision on two points:- First, that the Police were reasonably certain that, the driver of the particular car was committing an offence, viz transporting illegal liquor, and secondly that a moving automobile may quickly depart from the jurisdiction.

One important thing to note is that, the police powers of search under section 25 of the police Act is thought to be wider, than under section 44 of CPC, in as much on the person being searched under the police Act, need not to have been arrested before being searched. This provisions lies the powers of police officers to mount Road Blocks.[84] Thus, section 25 of the police Act provides that:-

> "A police officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe have been stolen or otherwise unlawfully obtained."

On conducting a search by a police officers on Road Blocks, police are accused of corrupt practices by the

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84 Ehindero, S.G. Supra Note 69 at 35

public. Based on this, "xsquard" in the police force was established in order to wipe corruptions in the force and to improve the police public image. An author[85] was of the opinion that, the best way of reducing corruptions in the police force, is by way of public enlightenment, not to offer, seek or receive bribe.

c) Search Under a Valid Warrant, But in an Unlawful Manner

Where a person is authorized by a valid warrant to search for one thing in a house but he makes a general search instead, and seized totally unrelated incriminating material, such search is unlawful. Sohoni has aptly remarked:-

> "It can scarcely have been the intention of the legislature to empower a Police Officer or other person in an important position to make harassing domiciliary visits to inquire minutely into the private concerns of individuals, and to search any part of their papers under the bare charge that something might

85 Tamunu, T.N. (1972) Police in Modern Nigeria, London press, p.258.

> thereby be proved tending to the conviction of any accused parties.[86]

However, section 76 of the Criminal Procedure Code, specifies that, the Police might seize any property by which an offence has been committed.

Thus, where a Police Officer is in possession of a search warrant, he may seize not only property specified in the warrant, but also other property not specified therein.

In the case of CHIC FASHIONS (WEST WALES LTD V. JONES.[87] I-AM-Peters Factory was broken into and ladies garments were stolen. Later some of the garments were offered for sale at a Chic Fashion Shop at less than the market value. The Police suspected that, the goods stolen had found their way into the Chic Fashions Shop. Search warrants were obtained and executed on Chic Fashions Shop. No garments of I-am Peters were found. But other garments suspected to be stolen were found and seized. On satisfactory explanation by Chic Fashions, the garments were released. Chic Fashion thereafter sued

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86 Sohoni, Supra Note 81, at 254.

87 (1968)2QB 299

the Police for damages. The Court of Appeal, held that,the Police were not liable.

3.2.1 Search of Person Upon Arrest

The Criminal Procedure Code, the Criminal Procedure Act, Police Act 1967 and Customs and "Excise Management Act of 1958, each empowers a Police Officer to search the arrested person. For example, Section 44(1) of the Criminal Procedure Code provides:-

> "A Police Officer making an arrest or receiving an arrested person from a person by whom the arrest has been made may search the arrested person or cause him to be searched."

By this provision; a Police may search or cause the arrested person to be searched.

It should be noted that, where the body of a woman is to be searched, the search should be conducted by a woman, and the search by one woman of another must be with strict regard to decency.[88]

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88 See Section 44(3), and Section 82 of the Criminal Procedure Code.

What is the test to be used to adjudge as to whether the action of a Police Officer was "reasonable" in conducting a search of a person? It is submitted that, it is the same test used by the courts to adjudge whether the conduct of the Police Officer was "reasonable" in effecting an arrest without a warrant of arrest.[89]

3.2.2 SEARCH OF PREMISES

The law relating to search of premises are provided in three sections of the Criminal Procedure Code.[90] For example, Section 74 of Criminal Procedure Code provides:-

> "Where for any reason it appears to court or justice of the peace that, it is impossible or inadvisable to proceed under Section 73 or that a search or inspection would further the purpose of any investigation, inquiry, trial or other proceeding under this Criminal Procedure Code, the court or justice of the peace, may issue a search warrant authorizing the person to whom it is addressed to search or inspect the place or places mentioned in the warrant for any document or thing specified or for any purpose

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89 See Obolo V. C.O.P. (1989)5NWLR 130, and Jackson V. Omorokuna (1981)1NCR 283.

90 See Section 74, 76 and Section 77 of the Criminal Procedure Code.

> described in the warrant and to seize any such document or thing and to dispose of it in accordance with the term of the warrant."

By this provision, if the court was of the view that, anything or document is so connected with the fact in issue, a search warrant may be issued for the production of such things or documents before a court.

Address of the premises to be searched must be stated in the warrant. Failure on the part of the court, a possible prosecution for trespassing may be brought against the Police Officer.

In the case of COMMISSIONER OF POLICE V. IGWE,[91] it was established that,where a Police Officer enters a house without a search warrant, the owner is entitled to defend his rights, if the police wanted to force the issue. For they are trespasser ab-initio.

The search will be illegal, if the court failed to specify the nature of the offence committed.

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91 (1961) 1 AII NLR 9.

In ROSE - MINSTER CASE[92] The Finance Act 1976 gave the Inland Revenue a power of search for frauds in very wide term. In 1979, the Inland Revenue exercised this power and obtained a search warrant to search the offices of Rose-Minister Group and the private house of individuals connected with the group. However, the search warrant failed to specify the offences for which the search was being conducted. The search was conducted and various documents seized. The Court of Appeal held that, the search was illegal for want of particularity.

3.2.3 Rules Relating to Search

The rules relating to search are provided in Section 78 - 82 of the Criminal Procedure Code. For example, Section 78(1) of the Criminal Procedure Code provides:-

> "All searches under Section 74-77 of the Criminal Procedure Code shall; unless the court or Justice of the Peace owing to the nature of the case otherwise directs, be made whenever possible in the presence of two respectable inhabitants of the neighborhood to be summoned by the person to whom the search warrant is addressed.

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92 (1979) 3 AII E R 85.

The term "respectability" does not depend on any particular status or wealth or anything of that kind.[93]

It should be noted that the violation of the provision of section 78 of the CPC, does not invalidate evidence thereby obtained. So the issue whether the police officer complied with the provision or not will not effect the evidence thereby obtained.[94] In this case, no two respectable persons were present, but stolen goods were recovered. It was held, the evidence was validly obtained.

It is the duty of the Police Officer to call those witnesses to give evidence in court, as to their presence.

In the case of OBEY CHUKWUDU AND ANOTHER V. COMMISSIONER OF POLICE[95] The appellant was convicted of theft by taking goods from the possession of the Nigerian Railway Corporation at Zaria Station. There were no eye-witnesses of the taking but, at the trial, a Police Constable testified that, he searched appellant's

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93 See Re-Ashfaq AIR (1936) AII 707

94 See Musa Sadau V. the State (1968) NMLR 208

95 Z/3CA/63 (Un reported).

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compound and found the stolen goods, although appellant claimed that, the goods lawfully belonged to him. The Constable claimed that, the search was made in the presence of several women from the neighborhood, although non appeared on trial. Hurley, C.J. stated thus:-

> "None of these person were called to give evidence and their absence was not accounted for. if they were there at the search, they could have told the Magistrate what the appellant said ... Assuming that, they were there for that purpose, they should have been in court to give evidence."

Section 78(2) of the Criminal Procedure Code provides:-

> "A list of all things seized in the course of search and of the places in which they are found shall be drawn up by the person carrying out the search and shall be signed or sealed by the witnesses."

Thus, an inventory must be made by the Officer conducting the search of any articles seized, stating the

places from which they were removed, and the inventory must be signed by the witnesses.[96]

3.2.4 Effect of Irregularities in Search

Section 382 of the Criminal Procedure Code provides that:-

> No finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the complaint, summons, warrant, public summons, order, judgement or other proceedings under the criminal procedure code, unless the appeal court or the reviewing authority thinks that a failure of justice has infact been occasioned by such error, omission or irregularity.

Section 101 of the Criminal Procedure Act contains a similar provision.

There are also decisions of superior court which are to the effect that illegality in conducting the search,

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96 See The State V. Njoku Agwu Z/36C/63 (Unreported).

does not vitiate the trial, or make the evidence which is relevant be in admissible.

In the case of MUSA SADAU V. THE STATE.[97] The appellant was charged and convicted in the High Court for being in possession of forged vehicle licensing forms. He was known as license agent and collected money from vehicle owners and issued forged licences to them. His house was searched by the Police, not in the presence of two neighbors as required by Section 78(1) of the Criminal Procedure Code and a large quantity of those forged licences were recovered. During the trial, he said he was a bicycle repairer and that it was the Police who carried into the house a bag of forced licenses recovered in his room. On appeal to Supreme Court, Counsel to the appellant argued that as Section 78(1) of the Criminal Procedure Code was not complied with during the search, the search was illegal and property recovered therefrom should not have been received in evidence. The DPP submitted that section 78(1) did not make the presence of witnesses mandatory during a search. It was held that, there is no rule of law that, evidence which

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97 (1968) NMLR 208, See also Ubochi V. The State (1993)8 NWLR 697.

is relevant is excluded merely by the way in which it has been obtained. The appeal was dismissed.

Similarly, in the case of KURUMA V. THE QUEEN.[98] Emergency regulations empowered Police Officer above the rank of Assistant Superintendent of Police to stop and search persons having in their possession any thing which could afford evidence of the commission of an offence. The applicant was searched at a Road Block by Police Officers not above the rank of Assistant Superintendent of Police. A knife and two rounds of ammunition were discovered. it was contended that, since the search was illegal, evidence obtained should not be admitted. It was held that, 'the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

Equally, in an English case of R.V. SENAT AND SIN.[99]The appellants were convicted of conspiracy to prevent the course of justice. The evidence admitted at the trial was evidence obtained illegally by tapping the

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98 (1955) AC 197, See also Oruwari V. State (1986)3 NWLR 486.

99 (1968)52 Cr APP R. 282.

telephone of the appellants. On appeal against conviction, it was contended that, the tape recording of the telephone conversation of the appellants ought not to have been admitted by the trial court. The English Court of Appeal rejected Counsel's contention and held hat, although the evidence was illegally obtained, nonetheless it was admissible in evidence, as it was relevant to the fact in issue. The appeal was dismissed.

The chapter highlights, the irregularities in arrest and search. It can be concluded that, any mistake, error, omission, or defects in making arrest with or without warrant, or in issuing or executing of search warrant, shall not by itself vitiate a criminal proceedings of a court of competent jurisdiction, unless the appeal court or reviewing authority thinks that, a failure of justice has infact been occasioned by such error or irregularity.

CHAPTER FOUR

IRREGULARITIES IN TRIAL

The present chapter seeks to observe the production of accused person and evidence before the court, and framing of charges. It will discuss their legal position under the Criminal Procedure Code and Criminal Procedure Act. It is necessary to examine the provisions of evidence the Act and some relevant decided cases. Generally the topics to be discussed shall include definition, summons, real and material evidence, confessions, formal and informal charges, irregularities and their effects.

4.1 Production of the Accused Person before the Court

Section 154(1) of the Criminal Procedure Code provides:

> "process to compel the attendance of the accused person shall ordinarily be a summon or a warrant."

Thus, the attendance of an offender in court is ensured by any of the two means:-

a) By summons and (b) by arrest with or without warrant.

What is a "summons"? A summons is defined as, a document directed by the court to an alleged offender calling upon him to appear before it to answer to the complaint made against him.[1]

Thus, Summons is an order by the Court to an alleged offender to attend the Court for trial.

Section 47(2) of the Criminal Procedure Code provides:-

> "Every summons so issued shall be in writing, in duplicate and signed or sealed by the "Court or Justice of the Peace."

Thus, any processes issued from a court should be signed by the presiding officer.

It is not irregular, if the presiding officer affixes his signature by means of a rubber stamp. In the case of GOODMAN V. EBAN LTD.[2] The English Court of Appeal held that, where a statute requires a person to

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1 Nwadialo, F. (1987) The Criminal Procedure of the Southern States of Nigeria, Professional Publishes Ltd., Ebute Metta Lagos, p.74.

2 (1954) 1QB 551.

sign a document, the provision of the statute is sufficiently complied with if the person affixes his signature on the document by means of rubber stamp, such a signature is deemed valid in law. Evoshod, M.R. stated thus:-

> "The ordinary mode of affixing a signature to a document is not by hand alone, but by the hand coupled with some instrument, such as a pen or pencil. I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case, it is the personal act of the party, and to all intents and purposes a signing of the document by him."[3]

Section 49(1) of the Criminal Procedure Code provides:-

> The summons shall, if practicable be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons.

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3 Ibid at 555 - 556.

The effect of this section is that, a service of the summons can be by either tendering or delivery of the duplicate.

A court cannot convict the accused on mere refusal to sign such document. In the case of SUDAN GOVERNMENT V. ALI HAKIN SHAWISH[4] on 12th August, 1957 at Barti village, a Policeman had summons that he was serving on various persons, amongst whom was accused to appear at a criminal trial. The summons was tendered to him, and he was asked by the serving Policeman to sign it, but he refused. the Policeman repeated the request to him, and he repeated his refusal to sign. The learned Magistrate charged and convicted him for refusal to sign under Section 149 of Sudan Penal Code. Counsel to the accused submitted that, Section 149 of the Sudan Penal Code, does not apply, and that refusal to sign a summons or refusal to receive a summons are not offences under the code, since the tender of the Summons constitutes proper service. Osman, El-Tayeb, P.J. stated thus:-

> "This section punishes intentional prevention of the service of summons, notice or order. A refusal to sign a

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4 (1963) SLJR 10.

KAS...

summons, a refusal to receive a summons, throwing down of a summons after service... do not constitute the offence of intentionally preventing the service of summons. The words "prevents the serving of himself" are not applicable to a case where the summons is tendered and refused. In as much as tendering is in itself good service, under the code of Criminal Procedure, the mere tender is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under this section."

Normally, the person summoned should be required to sign on the back of the duplicate or otherwise signify receipt of the summons.[5] In a situation where the person summoned refuses to sign or has torned the summon on the face of the bailiff - the criminal procedure Code offers no provision in dealing with such a man. In practice, such a person may be committed to contempt of court. Under the criminal procedure Act, such a man will be arrested and committed to prison. Section 95 of the criminal procedure Act provides:-

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5 See section 49 of Criminal Procedure Code.

> "Every person who is required to sign a receipt on the back of a duplicate summons to the effect that he has received the summon and fails to sign such receipt may be arrested by the person serving the summons and taken before the court which issued the summons and may be detained in custody or committed to prison for such time not exceeding fourteen days as the court may think necessary."

In a situation where a person to be served with a summon is a hostile or aggressive person, a substituted service may be effected, by leaving one of the duplicate for the defendant with some adult male member of his family.[6]

4.2 Production of Evidence Before the Court

A prosecution or any party in dispute, may bring any evidence before the court, which it believes will assist it in proving its case.

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6 See Section 52 of Criminal Procedure Code and Section 90 of Criminal procedure Act.

What is evidence? According to a learned author, evidence is that which makes evidence a fact to a Judicial Tribunal.[7]

Thus, evidence is that, which may be placed before the court in order that it may decide the fact in issue.

Evidence is defined as:-

> "Information that gives a strong reason for believing something or proves something."[8]

Also Evidence has been defined as:-

> "Any species of proof or by probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, et cetera, for the purpose of inducing belief in the minds of the court."[9]

It appears that according to Nokes - evidence is merely a fact presented to a tribunal. This is an over simplification of the definition of evidence, since all facts may not be regarded as evidence if it is viewed against the background that there exists facts, fact in issue and material facts. Moreover, from Henry's definition above, evidence would mean any fact that has a probative value or a specie of proof could satisfy the idea of evidence. Examples of evidence, may be statements made by witnesses or documents or exhibits and concrete objects to mention but a few.

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7 Nokes, G.D. (1956) An Introduction to Evidence (Second edition) p.3, Sweet and Maxwell Limited London, p.3.

8 Hornby, A.S. Ibid at p.396.

9 Henry, C.B. Ibid at p.555.

4.2.1 Real Evidence

According to a learned author, real evidence means, material objects other than documents produced for the inspection of the court.[10]

The Criminal Procedure Code, explains the term "real evidence, "to include the inspection of material objects. For example, Section 243 of the Criminal Procedure Code provides:-

> Whenever in the course of any Judicial Proceeding, the court thinks it advisable to view the place where the offence is alleged to have been committed or any other place, the court may either adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place concerned accompanied by the accused and may cause any witness to be conducted either and may take any evidence or hear any statement or explanation by the accused on the sport, and the prosecutor and the counsel for the accused, if any, shall have the right to be present at the view.[11]

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10 Nokes, G.D., Ibid p. 404.

11 See Section 77(ii) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990.

The effect of the Section, it offers two alternatives procedure for inspection:-

i) The court may adjourn the hearing of the case to the place where the object is and continue hearing the case there as if it were the court room.

The proper procedure has to be followed, before such inspection be admitted as evidence. The defence must be given an opportunity of cross-examining the witnesses, when the court reconvenes at it's original place of sitting. Refusal thereof, is a fundamental irregularity, which can vitiate a proceeding.

In the case of COMMISSIONER OF POLICE V. OLAOPA.[12] The accused was charged before a magistrate court, Ibadan with malicious damage to property. At the conclusion of the prosecution's case, the court moved to the locus to view the place where the offence was alleged to have been committed. At the locus, certain witnesses showed certain spots to the magistrate. The proceedings at the locus were recorded. Counsels were invited to question the witness but they did not do so. After viewing the locus, the court adjourned back to it's original sitting,

12 (1959) WRNLR 22.

the trial continued, but the witnesses were not re-called to give evidence, and the accused was convicted. On appeal to High Court against conviction, it was argued that, since the witnesses were not cross-examined when the court reconvened at it's original place of sitting, the proper procedure was not followed. The High Court held that, the witnesses who took part in the inspection should have been put into the witness box to state on oath what part they took in the inspection and then cross-examined.

Cross examination of witnesses, whose evidence contradicts accused person's version is fundamental requirement. Refusal thereof shall amount to denial of fair hearing. It is a substantial irregularity which can vitiate a trial. In the case of OFOKE NWABE V. THE STATE[13] The trial High Court of Enugu State, sitting at Abakaliki, had on 4 May, 1987 convicted the appellant of the murder of one Nwoke Ottah punishable under section 319(1) of the criminal code and accordingly sentenced him to death. While a marriage ceremony was going on in the house of PW3, to which the appellant and many other persons had been invited. The appellant stabbed the deceased and took to his heel. He was pursued by PW3 and

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13 (1995)3 SCNJ 77.

some other person including the deceased. PW3 held a stick while pursuing the appellant. The deceased attempted to apprehend the appellant by his hands only. The appellant on falling to the ground turned round to stab the deceased with a knife. The appellant denied stabbing the deceased in his statement to the police, exhibit "A, and in his testimony before the court. The trial judge disbelieved him. However, there is evidence that, the appellant was not given an opportunity to cross-examine either PW2 or PW3 on the issue of knocking off his tooth. His appeal to the court of appeal was dismissed. He further appeal to the Supreme Court, and it was held that, omission or failure to cross-examine witnesses is fundamental irregularity, which vitiate a trial.

ii) The Court may adjourn the case proceed to the locus inquo to view it, and evidence of what transpired at the locus are subsequently given in court afterwards.

In the case of R V. DOGBE.[14] The court, the accused, his counsel together with the counsel for the prosecution and such material witnesses for the defence or the prosecution proceeded to the scene. There, the witness pointed out such places and things as are material to the case and distances were arrived. When the court subsequently reassembled, such witnesses put in the witness box and stated on oath what part he took at the inspection and what he did. Lucie Smith, C.J. observed as follows:

> "The practice, and to our mind an excellent practice, in several colonies and we believe in England, is for the court accompanied by the accused and his advocate together with the advocate for the crown and such witnesses for the prosecution and the defence to the locus. The witnesses there point out such places and things as the material to the case and distances are stepped off or otherwise arrived at. The court then re-assembles, and the person who were used at the view are put into the witnesses box, and on oath, state what part they took in the recent visit to the locus and what they each did. The

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14 (1947) 12 WACA 184. See also Solsmograph Services Ltd V. Akpyovo (1974) SC 199.

> defence or the crown, as the case may be, are then given an opportunity of cross-examining."[15]

Failure of the trial judge to call the accused and witnesses to testify on oath in the court, on what transpired at the locus is an irregular procedure, which led to miscarriage of justice.

In the case of ARUTU V. R.[16] The accused was charged with murder, at Ibadan, before Doherty, J. After the case had been adjourned for judgement, the trial Judge accompanied by the accused defence counsel, prosecuting counsel and witness visited the locus. The Judge made a note in the record of proceedings. The trial Judge without calling the accused and witnesses to testify on oath in the court on what transpired at the locus convicted the accused. On appeal against conviction, the Federal Supreme Court held that, the proper procedure was not followed, failure of the trial Judge to put the accused and the witnesses in the box to state on oath what part they took at the locus and to allow for cross-examination - of the witnesses was a fundamental

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15 Ibid at 185.

16 (1959) 4 FSC 66

irregularity. The irregularity in procedure led to a miscarriage of Justice. The appeal was allowed.

However, not every irregularity in procedure vitiate the proceeding of the court. In the case of OGUNTOLA V. THE STATE.[17] The accused was charged and convicted of murder. On appeal against conviction, it was argued that, the trial Judges observations at the locus were not part of the record of proceedings, as such it was irregular. The court accepted Counsel's contention, but did not cause the appellant a miscarriage of Justice. Thus, the appeal was dismissed.

Similarly, in the case of AYISATU ADUNFE AND OTHER V. INSPECTOR GENERAL OF POLICE.[18] This was a prosecution which followed the Oshogbo riots before magistrate court Ilesha in which considerable damage was done to property. Among two or three hundred persons arrested by the Police, 125 persons were charged to court in Ilesha. Before taking evidence in the case, the trial Magistrate, the Police Officer,and Counsel for the accused persons all went to the scene at Oshogbo 20 miles away, without taking the accused persons along with them. The Federal Supreme Court held, this procedure to be wrong,

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17 (1987)1 NWLR (PT.50) 464. See also Afolayan Itade V. Ogunyemi (1996)9NWLR (PT.470) 17 and Aboyeji V. Momoh (1994)4 NWLR (PT.341)646.

18 (1957) 2FSC 21.

even though it would have been terribly inconvenient to convey 125 accused persons from Ilesha to Oshogbo and back. However, since the accused did not suffer injustice as a result of irregularity, the appeal was dismissed.

It should be noted that the purpose of an inspection of a locus in quo by a court of law, is not to substitute "the eye for the ear" but, rather to clear any doubts or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features...[19]

4.2.2 Material Evidence

The term "material evidence" has not been defined by the Criminal Procedure Code or the Evidence Act.

The Blacks Law Dictionary[20] defines "Material Evidence" as that quality of evidence,which tends to influence the trier of fact because, of it's logical connection with the issue.[21]

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19 See Ipinlaiye V. Chief Olukotun (1996) 6 NWLR (PT.453)148 and also, see Olusam V. Oshasona (1992)6 NWLR (PT.245)22.

20 Henry, C.B. (1990) Black Law Dictionary (Six Edition) St. Paul, Minn West Publishing Co. p.976

21 See Barr V. Doiphin Holding Corporation. 141 NYS 906 at 908.

Thus, material evidence is an evidence which has an effective influence or bearing on question in issue. Any essential testimony to the just decision of the case before the court, is a material fact.

4.2.3 Confession

A confession has been defined as

> "an admission made at any time by a person charged with a crime, stating or suggesting inference that he committed that crime."[22]

Thus a confession is an admission of guilt. Section 126 (2) of the Criminal Procedure Code provides:-

> "No Police Officer shall record any such confession unless after questioning the person making it he is satisfied that it is made voluntarily."

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22 See Section 27(1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990.

The effect of this Sections is that, confession if voluntary is relevant as against the person who makes it only.

The word "voluntary" is not defined under the Criminal Procedure Code. However, it's meaning may be illustrated with reference to the provision of Section 124(1) of the Criminal Procedure Code, which provides:

> "No Police Officer or person in authority shall make use of any threat or any promise of an advantage towards any person in an investigation under this Criminal Procedure Code in order to influence the evidence he may give."

Thus, a confession can be considered as irrelevant, if it appears to the court that, such confession is made as a result of inducement or threat having reference to the charge.

A police officer conducting an investigation under the criminal procedure code, is prohibited by the section from making use of any threat or promise of an advantage towards any person in order to influence the evidence. It is an irregular proceeding, to convict an accused

village that, those who had committed the offence should come forward so that the innocent ones taken to other village might be released. Three of the defendants then made statements confessing to complicity in the offence. They were convicted on those statements. Quashing the conviction, the Supreme Court held that, the confession was not free and voluntary, for it was plain that, the Police had taken persons to the other village and were detaining them there, so that it would operate on the minds of their fellow villagers.

Similarly, in the case of R V. MIDDLEON[26] The defendant was charged with an offence of dishonesty in the house of Mrs. X. He was told by the Police that Mrs. X and children would be kept in the cell unless he confesses. It was held by the court of Appeal this could be an inducement or threat. The threat need not be to his immediate family, it could be to someone for whom he showed some concern.

Equally in the case of R V. BODOM[27] The accused persons were tied and beaten by their fellow villagers

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26 (1974)2 AII ER 1190.

27 2 WACA 390

and told to confess by a man in authority in the village. It was held that, the confessions they made subsequently, even after caution by the Police were wrongly admitted.

The Criminal Procedure Code, does not define who is "a person in authority." The Common Law description of such a person is some one engaged in the arrest, detention, examination, prosecution or punishment of the accused.[28]

An employer is a person in authority if the offence is against his person or property.

In the case of R V. MOORE[29] Pake, B., said:-

> "It is only when the offence concerns the master or mistress that, their holding out the threat or promise render the confession in admissible."

It should be noted that, it is the duty of prosecution to prove affirmatively to the satisfaction of

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28 Phipson, S.L. (1980) Phipson on Evidence, (Eleventh Edition) Sweet and Maxwell, London, p.186

29 (1852)2 Don 522

the court, that, a confession was free and voluntary before tendering it in evidence. It is therefore irregular to admit a confessional statement through an accused person during his cross examination by the prosecution.

In the case of DEKANBI V. ATTORNEY GENERAL OF WESTERN NIGERIA.[30] The prosecution failed to call the Police Constable who took the appellant's confessional statement because, the Judge refused an adjournment for him to be called. The statement was consequently not tendered by the prosecution in the course of it's case. But when the appellant gave evidence in his defence, he agreed under cross - examination that, he could read and that he had signed the statement, where upon the prosecution tendered it through him. The appellant's counsel objected to the admissibility of the statement contending that, the prosecution had not proved that it had been made voluntarily. The appellant denied that, he read the statement before signing it and protested that, it did not represent what he said. The trial Judge nevertheless admitted the statement saying that, its voluntariness was not in issue, but only it's accuracy

30 (1966) 1 AII NLR 47.

which according to him, the appellant could still challenge. He also disbelieved the appellant's denials about the contents of the statement. On appeal, the Supreme Court held that, the Judge erred in admitting the statement or by so doing he seemed to overlook the fact that, the burden of proving affirmatively that a confession was made voluntarily is always on the prosecution.

The position of retracting a confession at trial stage is always regarded as an "after thought," and carries no weight. In the case of GABRIEL OSAKWE V. A.G. BENDEL STATE[31] The appellant was arraigned with four others in the High Court of former Bendel on a two count information alleging conspiracy to commit murder, and murder of one Anna Nun on 29 November, 1984. On 26 November, 1984 at Abudu, the appellant along with his four co-accused agreed with a man called Owun to kill one Anna Nun (the deceased) for refusing Owun's sexual advances to her after having taken one hundred Naira from him. The appellant conspired with the four others with whom he agreed to wait by the road side in order to

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31 (1994) 2NWLR (PT.326) 273, See also Madaki V. The State (1996) 2 NWLR (PT.429) 171, Augustine V. The State (1994) 2 NWLR (PT.327) 380, Umau-Kassa V. The State (1994) 2NWLR (PT.143) 143, Mumuni V. The State (1993) 8 NWLR (PT.313) 602.

waylay the deceased in Abudu, while she was returning home at about 6.30pm from where she had gone to grind cassava. They did as agreed by waylaying her, and one of them had sexual intercourse with her after killing her and finally they removed parts of her body which they took to their hirer. Upon arrest, the appellant and his co-accused persons made confessional statements. However, the appellant later retracted his confessional statement, alleging that he was severely beaten and thereafter forced to sign certain documents, the contents of which he did not know. The trial court, per Gbemudu, J. in a well considered Judgement convicted and sentenced him and his co-accused to death. Aggrieved, the appellant and his confederates appealed to the court of Appeal. The court of appeal after hearing the appellant's appeal dismissed it and affirmed the decision of the trial court. The appellant, being further dissatisfied with the decision of the court of Appeal, appealed to the Supreme Court. The court unanimously dismissing the Appeal, stated thus:-

> "A confessional statement does not become inadmissible as evidence or liable to be discontenanced or disregarded merely because, the

> accused person retracted it in his evidence before the trial court. It is trite law that a confessional statement will not be rejected because an accused denied making it.[32]

Similarly, in the case of EDAMINE V. THE STATE.[33] The appellant, a blind man was charged with the murder of his wife, at the High Court Abakaliki in Anambra State. The appellant's brother was in his house on the day of the incident, when one Nkwuda told him about the appellant and his wife. The P.W.2 went to his father's compound where the appellant lived. He told the appellant that, he heard information that, you fought with your wife. The appellant told the witness that he killed her with a matchet because, she was giving his properties out to people. The witness went inside the room, and saw the deceased lying in a pool of blood. There was matchet cuts on her face and neck. He asked for the matchet. The appellant brought out the matchet he

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32 Ibid at 276 - 279.

33 (1996) 3 NWLR (PT.438) 530. See also Felix Okoro V. The State (1993) 3 NWLR (PT.282) 425, Gira V. The State (1996) 4 NWLR (PT.443) 375.

used and threw it outside. The witness picked it and kept it some where, with a blood stain. PW2 later reported to the Police. The appellant volunteered two confessional statements to the police where in he admitted matching his wife to death. At the conclusion of hearing, the appellant was found guilty of murder and sentenced to death. He appealed to the Court of Appeal, the court dismissed the appeal. He further appealed to Supreme Court. The Court in dismissing the appeal, stated thus:-

> A voluntary confession of guilt is sufficient to warrant a conviction without any corroborative evidence. Thus, when a confession is well proved, it is the best evidence that can be produced. In the instant case the appellant voluntarily confessed to have used his matchet to kill his wife. This confession coupled with PW2's testimony is enough to sustain the appellant's conviction. It is immaterial that the accused resile from it during his trial, such retraction does not affect it's admissibility.[34]

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34 Ibid at 538.

It is imperative to state at this juncture that for the police to be able to establish that, the confessional statements made by the accused is in compliance with the laid down rules and procedure, they must have observed the Judge's rules.[35] However, where an accused person still object to the admission of his alleged confessional statement, the court is obliged to conduct trial within trial,[36] with a view to ascertaining whether or not the accused confessional statement were voluntarily obtained.

Whenever a court is satisfied that, the evidence adduced has established a prima-facie case against the accused person, a charge will be framed. The framing of a charge is a vital part of the trial, for it establishes which offence or offences the prosecution must prove to convict the defendant, and it puts the defendant on notice as to the offence and the particulars of the case against which he must defend himself, under the Criminal Procedure Code, charges are framed by Magistrate or Judge.[37]

4.3 Definition of Charge

According to a learned author, a charge means

> "a written statement of the offence by name and section, which the accused is

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35 This was fully discussed at p.105 - 107 ante

36 As was earlier discussed at p.108 - 110 ante

37 See Section 160 of Criminal Procedure Code.

alleged to have committed, framed by a court or magistrate when it appears to such court or magistrate that a prima-facie case has been established.[38]

An Indian author has aptly remarked

"... an accused is entitled to know with the great precision and peculiarity the acts said to have been committed and section of the penal law infringed, otherwise he must be seriously prejudiced in his defence.[39]

Thus, a charge is a document, which states the offence or offences which the prosecution will prove on the trial.

Document is defined in section 2(1) Evidence Act[40] as:-

"Books, maps, plan, drawing, photographs and also includes any matter expressed or described upon any

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38 Shani, B.M. Ibid Note 4, 148.

39 Sarkar, S.C. (1960) Law of Criminal Procedure (Third Edition) Gouraga Press private Ltd. Calcutta, p.362.

40 See Cap. 112 Laws of Federation of Nigeria, 1990.

substance by means of letters, figures or marks or by more than one of these means, intended to be used or which maybe used for the purpose of recording that matter."

4.3.1 **Formal Charge**

A formal charge is provided by sections 200 - 220 of the Criminal Procedure Code. For example, section 202 of the Criminal Procedure Code provides:-

"The charge must contain such particulars as to the time and place of the alleged offence and the person, if any against whom, or the thing if any in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged."

By this provision, all charge framed must contain particulars as to time, place and person against whom an offence is committed

The charge must contain the "time" when, an offence is alleged to have been committed. However, it will not amount to an irregularity or vitiate the proceeding, if the exact date is not stated in the charge.

In the case of &_y. POSSlJ[1] IT was held that, though the date of the offence should be called in the indictment, it has never been necessary that, it should be laid according to truth, unless time is essence of the offence.

Similarly, in the case of pupn V, POLICE.[42] The accused was charged with receiving gratification on or about 3 May 1960. The evidence adduced at the trial showed that, the offence was committed between 5 and 7 May 1960. ' The Magistrate, before delivering Judgement, amended the date on the charge to read on or about the 5 to 7 May 1960. The accused was convicted. On appeal against conviction the court observed that,the amendment was unnecessary, and noted that, although the date of the offence should be stated in the charge sheet, it has never been necessary that, it should be stated with exactitude.

The "name of the person" allegedly offended must be stated in the charge sheet. An irregularity or mistake of not stating the name of the owner of property will not

41 13 Cr. App. R 158. See also The Quoen V. Zakwakwa of Yorro 5 FSC 12

42 (1960) LLR 130. See also Ibrahim Shinfiria V. COP (1970) NNLR 113

amount to miscarriage of Justice. In the case of EWHARIEME AND OTHERS V. THE STATE[43] The accused persons were convicted of armed robbery. They appealed against their conviction to the court of appeal, on the ground that, the charge was defective because, the owner of the property allegedly stolen was not stated in the charge sheet. The appeal was dismissed and case went on further appeal to the Supreme Court. The Supreme Court held that, it was not mandatory that, the name of the owner of property allegedly stolen must be contained in a charge sheet. It relied on Section 154(1) of the Criminal Procedure Act, and dismissed the appeal.

The "Offence" allegedly committed by the accused must be stated in the charge sheet.

In the case of OGBODU V. THE STATE.[44] The accused was charged with murder. The statement of offence in the Information stated the offence alleged against the accused as murder, but the particulars of offence stated that, the accused unlawfully killed the deceased. The

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43 (1985) 11 SC 174. See also Patrick Okosu V. The State FCA/B/25/77 (unreported)

44 (1987) 2 NWLR (PT.54) 20.

accused was convicted. On appeal against conviction, it was contended inter-alia that, the charge was defective because, the particulars of offence stated that, the accused "unlawfully killed" the deceased, instead of stating that, the accused "murdered" the deceased. The Supreme Court rejected Counsel's contention. It held that, although the precedents in the third schedule to the CPA employs the word "murdered" instead of "unlawfully killed" for it's precedent charge for murder, nonetheless it is permissible to use the expression "unlawfully killed" instead of "murder" because, the former expression encompasses both murder and manslaughter by virtue of Section 315 of the Criminal Code. No miscarriage of justice.

In a charge of criminal breach of trust or criminal misappropriation of money. For example, a cashier who stole money from his employer occasionally. Each of these stealings is separate and distinct offence. Yet nobody other than the accused knows the time each took place or the amount involved. In such a case, it is permissible to charge the person in one count with stealing. Section 203 of the criminal procedure code provides:

> "When the accused is charged with criminal breach of trust or criminal misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed, shall be deemed to be a charge of a single offence."

Under the criminal procedure code, it is a rule that, distinct offences should not be combined in one head of charge. The distinctness of one offence from another can be based on the difference of time in their commission, or the difference in the places at which they are committed. Section 212 of the Criminal Procedure Code provides:

> "For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except incases mentioned in Section 213 - 216 and 221 of the Criminal Procedure Code."

Thus, distinct offences should not be combined in one head of charge. A duplicity will amount to irregularity, rendering the conviction unsustainable.

In the case of ADEBAYO V. THE STATE.[45] Six persons were arraigned before the High Court and charged with the following offences, conspiracy, obtaining money by false pretence and stealing. Two of the six accused persons absconded from custody and charges against them were withdrawn. The evidence against the remaining four accused persons was that, on at least thirteen occasions, they collected different sums of money totalling ₦582,000 from the complainant, promising to sell her rice and other commodities. The rice and other commodities were not delivered to the complainant and her money was not refunded to her. The charge of stealing was drafted against the accused persons alleging that, they stole the aggregate sum of ₦528,000 in a single count. The accused persons were convicted of all the offences. On appeal against conviction it was argued that, the count of stealing drafted against the accused persons was bad for duplicity because, the accused received the money from

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45 (1987) 2 NWLR (PT.57) 468. See also Azda Danga and Six Others V. Tiv N.A MD/13/CA/64 (Unreported) and Ogunye V. State (1995) 8 NWLR (PT.413)333.

the complainant on not less than thirteen different occasions. Each act of receiving the money should therefore constitute a separate count, so there ought to have been not less than thirteen counts of stealing as against the one count drafted against the accused persons. The Court of Appeal accepted Counsel's submission. It held that, the count was bad for duplicity, and conviction set-aside.

Similarly, in the case of AWOBUTU V. THE STATE[46] The appellant was charged with a single count with stealing a number of cheques between the months of April and August of the same year. The cheques which bore varying dates were not physically found in possession of the appellant at the dates of recovery, but were presumed to have been in such possession on the dates appearing on them. The presumption that, they were stolen on the same day could not therefore arise. It was accordingly held that, the count was bad for duplicity.

Equally, in the case of OKEKE V. POLICE.[47] The accused was an employer of the Nigerian Railway. He

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46 (1976) 1 AII NLR (Part I) 292.

47 12 WACA 363.

unlawfully demanded and obtained four Naira from the complainant, as a condition for putting a railway wagon at his disposal for the purposes of carrying goods by rail. The accused was convicted of demanding property with menace. The accused appealed against conviction on the ground that, the charge against him was bad for duplicity because, the demanding and receiving were lumped in the same count. It was argued that, the demand constituted an offence and the receiving a separate offence, and thus each ought to constitute separate counts in the charge. The West African Court of Appeal accepted the appellant's contention. It held that charge bad for duplicity because, the two offences were wrongly contained in a single count.

Equally, illustrative of the rule against duplicity is the case of R V. BALLY SIGH.[48] The accused was charged with stealing several articles from different departments of a large department store. All the articles allegedly stolen were contained in one count. The accused was convicted. On appeal against conviction, the court held that, the charge was bad for duplicity. Each act of

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48 (1953) 37 Cr APP R 28. See also Oladejo V. State (1994)6 NWLR (PT.348) 101.

stealing ought to have been contained in a separate counts of the charge.

Offences of the same kind or nature if committed in a single transaction can all be contained in one count of a charge.

Section 213 of the Criminal Procedure Code provides:

> Where a person is accused of several offences of same or similar character he may be charged with and tried at one trial for any number of them....

By this provision, offences of the same nature or identical may be charged together, and such procedure will not vitiate the proceeding of the court.

In the case of JOHN AND ANOTHER V. THE STATE.[49] The appellants were charged with house breaking contrary to section 411(a) and stealing contrary to Section 390(4) of the Criminal Code in different counts. The Supreme Court Said,

> "It is more usual to charge in this type of case one count only, thus house breaking and stealing."

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49 (1966) AII NLR 211.

However, it does not seem necessary to have a detailed discussion of all the sections dealing with the formal charge because, they are beyond the scope of this thesis.

4.3.2 Informal Charge

Informal charge may be defined as, "unwritten statement of offence or offences against an accused person."

section 387 of the Criminal Procedure Code, provides:

> Not withstanding the provisions of this Criminal Procedure Code, it shall be sufficient in any trial before an area court to have, instead of a formal charge, a statement of the offence complained of with date and place, and when material, the value of the property in respect of which the offence has been committed.

The effect of this section is that, the essential particulars are mandatory in an unwritten charge, the date, place or the value of property involved must be stated.

An irregularity for not stating the "date" of the offence, may render the conviction unsustainable.

In the case of IBRAHIM BIGIDAN V. KANO NA.[50] There was no charge, formal or informal, but a mere statement of the facts, by a Police Officer mentioning that, the accused had been found in possession of stolen property. But the Police Officer had failed to mention the date of the theft, and when the property recently stolen raises a presumption of theft, this was essential fact. The appeal against conviction was therefore allowed.

Failure to mention the "place" of the offence, may vitiate the proceeding of the court. In the case of ALHAJI IBRAHIM BABA DOKA V. ZARIA N.A.[51] It was held that, the charge was defective because, it did not state the place of the offence.

It is a fundamental irregularity, for not explaining the "offence" to the accused person. In the case of DABO FULANI AND ANOTHER V. BORNO NATIVE AUTHORITY.[52] The

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50 (1961) NNCN 11

51 (1966) NNLR 145.

52 SC/460/66 (Unreported).

charge was explained to the appellants in accordance with Section 387 of the Criminal Procedure Code, in the following terms:-

> I TALBA KAKA charge you Dabo Fulani Njobi Fulani, for you on 16/11/65 between Bornu Kuji and Manursdushi village robbed 4 people on the Public Highway and stole one basket, wrapper, head tie and canvas shoes from Mawu and you also shot one Bello with arrow in the robbery and killed him. You thereby committed offence under Section 220 Penal Code.

The appellant pleaded guilty to the charge, but declined to give evidence. The court give judgement convicting each of them under section 221 (a) of the Penal code. On appeal to the FSC Brett, JSC stated thus:-

> "We are unable to say if the appellants were in fact misled, but there is a real possibility that,they might have denied acting with either of the intentions set out in section 221 of the Penal Code,if this had been put plainly in issue, and we find it impossible to uphold the conviction as it stands. Convictions of culpable homicide not punishable with death substituted."

Similarly, in the case of NYABO ATUMA V. WUKARI, N.A[53]

The charge read to the accused was that:- "He had committed an offence punishable under Section 387 of the Penal Code." This charge was denounced by the High Court, as not meeting the standards established by Section 387 of the Criminal Procedure Code because, an accused cannot be expected to know that a certain section number corresponds to a certain offence. The Appeal was allowed.

4.3.3. Effect of Irregularities in the Charge

The effect of framing a charge which contains an error have been mentioned in Sections 206 and 222 of the Criminal Procedure Code. For example, section 206 of the Criminal Procedure Code provides:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless

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53 (1961) NNCN 17.

> the accused was infact misled by such error or omission and it has occasioned a failure of justice.[54]

An omission or error in stating "particulars" or ingredients of the offence shall not by itself vitiate the proceedings.[55]

Similarly in the case of ISHAKU MANGAI V. THE STATE.[56] The appellant was arraigned before the High Court in Jos on charges pursuant to Section 229 (1) of the Penal Code, which were framed as follows:-

> "That you Ishaku Mangai on or about the 4 day of February, 1985 at Kwatas village, in Mangai Local Government within the Plateau Judicial Division did an act to wit shooting Alhaji Sati on the head with a gun with such intention and under such circumstances that, if by that act you had caused the death of Alhaji Sati you would have been guilty of culpable homicide

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54 See Section 166 of the Criminal Procedure Act.

55 See Ogbodu V. The State supra at 197

56 (1993) 3 NWLR(PT.279) 108. See also Bankole V. The State (1980) 1 NLR 334 and Udo Essien V. C.O.P. (1996) 5 NWLR (PT.449) 489.

an offence punishable under Section 229(1) of the Penal Code."

The facts of the case are as follows, on the 4 day of February, 1985 at about 8.pm, twelve persons gathered in the room of PW2 discussing on how to build a school in their village. At the same time, the appellant came to the house of PW1, where the meeting was being held and opened the door curtain and fired a dane gun and shot the deceased. Consequently he was rushed to the University Teaching Hospital Jos, a Surgeon extracted some bullets from his head. The learned trial Judge convicted the appellant to death. Being dissatisfied, he appealed to the court of Appeal on the ground that,the charges as laid are defective because, of an omission of the word "knowledge" Okezie, JCA stated thus:-

> "The mere use of "or" in a statute creating an offence does not mean the two words "intention" or "knowledge" as in the instant case must be in the charge in order to sustain the validity of the charges. Even if it is conceded that, the charges as laid are defective, the defence must show he is prejudiced by the charges. In this, case, the appellant was not

embarrassed or prejudiced by the charge now being objected to.".[57]

Equally, in the case of THE STATE V. SALIHU MOHAMMED GWATO AND OTHERS.[58] The Supreme Court, Nnamani, JSC stated thus:-

> "It is well settled that, a Court of Appeal will not interfere on an issue of duplicity, if it is clear from the records of proceedings that, the accused knew what charge he was to face, was neither embarrassed, nor prejudiced and there is no miscarriage of justice."

An irregularity or omission in not stating the exact title to the enactment contravened, shall not vitiate the trial.

In the case of OGBOMOR V. THE STATE.[59] The accused was charged before the Robbery and Fire Arms Tribunal, with armed robbery contrary to the Robbery and Fire Act 1970. He was convicted. On appeal against conviction, it was contended that, the accused was charged for an

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57 Ibid. at 110-111.

58 (1993) 3 SC 62 at 81. See also Awobotu V. Commissioner of Police (1976) 1 AII NLR (Part I) 465 and Moses Egbuwa V. C.O.P JD/31/CA/63 (Unreported)

59 (1985) 2 SC 289. See also Diala Amako V. The State (1995)6 NWLR (PT.399) 11 and Monday Chukwu V. The State (1994)3 NWLR (PT.640) 640.

offence unknown to law because, there is no statute known as the Robbery and Fire Arms Act 1970. The Supreme Court rejected Counsel's contention. It held that, the offence of armed robbery is known to law. It is contained both in the Criminal Procedure and in Robbery and Fire Arms (Special Provisions) Act 1970, even though erroneously charged under a non-existent law, and that the accused was not misled or prejudiced by the mistake. Appeal dismissed.

The chapter highlights the irregularities in both the production of accused person and evidence before the court, and also discussed irregularities and effect in the charge. It can be concluded that, any error, omission, irregularity in a charge or in production of accused person before the court shall not vitiate the proceedings of a court of competent jurisdiction, unless a failure of justice is occasioned by such error.[60] The proper procedure, in production of evidence before the court, must be complied with, otherwise such evidence shall not be admissible.[61]

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60 See Sections 206, 382 of the Criminal Procedure Code, and Sections 101, 166 of the Criminal Procedure Act.

61 See Section 243 of the Criminal Procedure Code and Section 207 of the Criminal Procedure Act.

CHAPTER FIVE

IRREGULARITIES IN JUDGEMENT AND SENTENCE

This chapter will examine judgement and sentence. It will discuss their legal position under the Criminal Procedure Code and Criminal Procedure Act. As a matter of necessity it will also examine some relevant decided cases. The topics to be discussed shall include, Nature and Contents of Judgement, Judgement and failure of justice test, limitation on sentencing power and effect of irregularities in judgement.

5.1 Nature of Judgement

The culmination of every trial is judgement. "Judgement" has been defined as, the sentence of the law, pronounced by a court upon the matter contained in the record.[1]

The Supreme Court has defined "Judgement" in the case of EJELIKWU V. THE STATE[2]

> The entire reasoning culminating in the finding of guilt, the conviction and the pronouncement of the

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1 Shani, B.M. Ibid P,173.

2 (1993) 7 NWLR (PT. 307) 554.

> punishment which is sentence. It is not merely the conclusion of the trial.[3]

S. 277(1) of the 1979 constitution defined "Decision of the court to mean:-

> "Any determination of that court and includes judgement, decree, order, conviction, sentence or recommendation."

Thus, judgement is the official and authentic decision of a court of justice upon the respective rights of the parties to an action or suit therein litigated and submitted for it's determination.

THE BLACKS LAW DICTIONARY.[4] Defined "Judgement" as, the final decision of the court resolving the disputes and determining the rights and obligations of the parties.

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3 Ibid at 562

4 Henry C.B. (1990) Black's Law Dictionary (Six Edition) West Publishing Co., United State, p.841.

After the presentation of the case by the prosecution and by the defence and addresses have been delivered by Counsel to both parties, the court delivers its judgement. The court may reserve judgement until some fixed date. It is customary for judgement to be reserved to enable the court to deliver a reasoned judgement.[5]

S. 268(1) of the Criminal Procedure Code provides:-

> "The judgement in every trial in a court shall be in writing and shall be pronounced and the substance of it explained in a language understood by the accused in open court either on the day on which the hearing terminates or at some subsequent time of which due notice shall be given.

By this provision, a Judge must reduce his judgement into "writing" "A Magistrate in the Northern States must reduce his judgement into writing before he delivers it.

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5 Doherty, O. (1990) Criminal Procedure in Nigeria Black Stone Press Limited, London, p.296.

If a court delivers oral judgement, such decision is null an void. In the case of THE STATE V. LOPEX.[6] The accused was tried and convicted of an offence under Section 115(1) of the Penal Code by the High Court. On appeal against conviction, it was argued on behalf of the appellant that, the judgement was invalid because, an oral judgement was delivered by the trial judge. The Supreme Court held that, the record of proceedings in the High Court revealed that, an oral judgement was delivered. It further held that, this is in contravention of section 268(1) of the Criminal Procedure Code, which requires judgement of every court of trial to be in writing. The appeal was therefore allowed.

Similarly, in the case of R V. FADINA.[7] The accused was tried and convicted of the offence of uttering. The trial Judge delivered an oral judgement from the notes taken down by him during the trial. The judgement of the court delivered orally was subsequently reduced into writing, dated and signed on appeal against conviction, the appellate court held that, the Judgement before it, was not a judgement within the meaning of Section 245 of

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6 (1968) 1 AII NLR 356.

7 3 FSC 11.

the Criminal Procedure Act (Section 268(1) of the Criminal Procedure Code) because, it had been reduced into writing, after it had been orally delivered by the Judge. The judgement was reduced into writing when the Judge was "functus officio." Thus it was declared null and void, and the appeal was allowed.

In the case of AJAYI V. THE STATE.[8] The accused persons were charged and convicted of several offences. In delivering judgement, the trial Judge stated that, he was reading from notes prepared by his son. The accused persons appealed against conviction on the ground that, the judgement was not a judgement within the intendment of Section 245 of the Criminal Procedure Act (Equivalent to Section 268 (1) of the Criminal Procedure Code). The court of Appeal held that, the judgement must have been written from the notes, after it had been delivered orally. Thus, there was contravention of section 245 of Criminal Procedure Act (Section 268(1) of the Criminal Procedure Code) and the appeal was therefore allowed.

Equally, oral judgement dictated in court to a Stenographer, does not constitute a written judgement.

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8 (1978)1 LRN 260.

In the case of OKORUWA V. THE STATE.[9] The accused persons were charged and convicted of manslaughter. The trial Judge dictated his judgement to his stenographer in Court, and purported that, the typed judgment was the written judgement. The accused persons appealed against their conviction. The Supreme Court held that, the judgement dictated in court to the stenographer was not a written judgement within the meaning of section 245 of the Criminal Procedure Act. Furthermore, it held that, as the purported judgement typed out by stenographer was written, dated and signed after the oral judgement had been delivered, it was null, void and of no effect. Thus, the appeal was allowed.

However, in the Southern States, it will not amount to vitiating the proceeding of the court, where a magistrate delivers an oral judgement.

In the case of OSAYANDE V. THE STATE.[10] Obaseki, JSC stated thus:

> "It is therefore crystal clear that the contention of learned counsel for

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9 (1975)5 SC 23

10 (1985) 3 SC 154 at 172. See also Okoruwa V. The State, Supra Note 9.

> the appellant can find no support in the three cases. Rather the competence of the Magistrate to deliver oral judgement under the statute not in breach, but in compliance has been emphasized by them. It is only in relation to a judge of the High Court that strict compliance with the letter of the Section is demanded."

It will not amount to any irregularity, where a judge employ his own style in writing his Judgement. In the case of ONUOHA V. STATE[11] Craig, JSC stated thus:-

> "... writing a judgement, is an act in itself and there is more than one way of going about it. It is possible to have as many variations. What is essential is that, the Judge should have a clear understanding of the facts in the case of the issue involved, and of the law applicable and from all these, he should be able to draw the right

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11 (1988)3 NWLR (PT.83) 460.

conclusions and make correct finding of the evidence before him.[12]

Similarly, in the case of ADEPETU V. STATE.[13] Muktar, JCA stated thus:-

> "On the writing of the judgement and the evaluation of evidence. I think what it boils down to is method and style adopted by the learned trial Judge. I believe each Judge has his own way of writing Judgement, be it reviewing the evidence of the prosecution first and then that of the defence... once the standard and prescription set out by the law has been complied with and proper weight has been ascribed to each set of evidence, an appellate court cannot and will not find fault with the judgement, unless the findings on the facts are perverse..."[14]

Sub-Section (2) to Section 268 of the Criminal Procedure Code states that:-

> If the accused person is in custody he shall be brought up to hear judgement

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12 Ibid.. at 470 - 471.

13 (1996) 6 NWLR(PT.452) 90. See also Mogaji V. Odofin (1978) 4 SC 91, Bello V. Eweka (1981) 1 SC 101 and Amokomowa V. Andu (1985) 1 NWLR (PT.3) 530.

14 Ibid at 116.

> delivered, if he is not in custody he shall be required to attend to hear judgement delivered, unless his presence is dispensed with by the court.

By this provision, the presence of the accused person in court, during the delivering of judgement cannot be dispensed.

Sub-section (3) to Section 268 of the Criminal Procedure Code provides that,

> No judgement delivered by any court shall be deemed to be invalid by reason only of the absence of any party or his counsel on the day or from the place notified for the delivery therefore or of any omission to serve or defect in service on the parties or their counsel or any of them of the notice of such day and place.

Thus, the absence of any party or counsel will not affect the judgement delivered. In the case of D.O.

OHIKPEHALE V. ZARIA NATIVE AUTHORITY.[15] The appellant was convicted by the Chief Alkali of Zaria, for an offence of falsification of accounts contrary to Section 371 of the Penal Code. The Chief Alkali delivered his judgement, when the appellant was not present in court. The appellant was later informed by the Chief Alkali that, he had been convicted of falsification of accounts, and was asked whether he had anything to say in mitigation of sentence. The appellant told the Chief Alkali that, he was not guilty of the offence, and therefore had nothing to say. He was sentenced to two years imprisonment. He appealed against his conviction on the ground that, he was not present when the judgement was delivered. Dismissing the appeal, Hurley, C.J. said:-

> "... We cannot declare the judgement invalid by reason only of the omission not to serve the appellant. There must be some other reason for invalidating the judgement before it can be set-aside... The absence of the appellant when the judgement was delivered did not prejudice him in regard to his right of appeal because, he was informed of it and exercised it and for that purpose obtained a copy

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15 Z/13CA/63 (Unreported) See also Asakitikpi V. The State (1993)5 NWLR (PT.296) 641.

> of the whole proceeding including the judgement and was able fully to argue his appeal. We can not say that the appellant was in any other way prejudice or that there was a failure of justice by his absence when the judgement was given."

In addition to Criminal Procedure Code, section 258(1) of the 1979 constitution provides that:

> Every court established under this constitution shall deliver it's decision in writing not later than 3 months after the conclusion of evidence and final addresses, and shall furnish all parties to the cause or matter determined with dully authenticated copies of the decision within seven days of the delivery thereof.

It is noteworthy that, the above section was amended by section 4 of the constitution (suspension and modification) amendment Decree No.17 of 1985, to the effect that, judgement delivered after three months does not perse become a nullity. There are a plethora of cases to the effect a judgement delivered more than three months after conclusion of addresses does not PER SE render it a nullity, unless there is a complaint that,

the delay occasioned a miscarriage of Justice, and such miscarriage is indeed shown, other wise the judgement subsists. In the case of GUFWAT V. THE STATE[16] The appellants were charged with culpable homicide, under section 221 of the penal code, before the Pankshin High Court in Plateau State. At the end of the trial, the learned trial Judge delivered his judgement more than one month after the expiration of the constitutionally prescribed period for doing so. He held that, the persecution had proved it's case against the accused persons. He convicted and sentenced them to death by hanging specifically. The appellants were aggrieved hence they appealed to the court of Appeal. The court of Appeal stated:-

> "The fact that a judgement of the High Court is delivered more than three months after conclusion of final addresses does not perse render the Judgement a nullity, unless there is a complaint., that the delay occasioned a miscarriage of Justice,

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16 (1994) 2 NWLR (PT.327) 435, See alswo Egwu V. Egwu (1995) 5 NWLR (PT.396) 493.

and such miscarriage is indeed shown,

otherwise the Judgement subsists."[17]

Similarly, in the case of THE REGISTERED TRUSTEES V. ADEOSUN[18] The parties in this case concluded their evidence and final addresses at the |High Court on 10 August, 1983, the trial judge delivered his Judgement on 8 December, 1983. For instance, four months after the evidence and final addresses were concluded contrary to the constitutionally stipulated period of three months under section 258(1) of the 1979 constitution. The plaintiffs/Appellants then appealed to the court of Appeal solely on this ground. The Judgement of the trial judge indicated the reason for the long adjournment as being the Election petitions during the 1983 General Elections which claimed priority over all other cases or matters pending before the court. The court of Appeal held, by virtue of the constitution (Suspension and Modification) Amendment Decree No.17 of 1985, the decision of a court is not to be treated as a nullity in terms of section 285(1) of the 1979 constitution, solely

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17 Ibid at 445

18 (1986) 3 NWLR (PT.30) 561, See also ROSSEK V. ACB (1993) 8 NWLR (PT.312) 382

on the ground that the Judgement was delivered more than three months after final addresses of counsel.

Equally, in the case of OJOKOLOBO V. ALAMU[19] The plaintiffs/Respondents were in a suit before an Ibadan High Court. The plaintiffs sued the appellants as defendants. The relief sought were, declaration for statutory right of occupancy, four hundred naira damages for trespass and an injunction restraining the defendants/appellants from committing further trespass. At the conclusion of evidence and trial addresses on the 7 day of July 1982, the learned trial Judge reserved judgements to 16 of July, 1982. However, on the 16 of July, 1982 the learned trial Judge further adjourned the Judgement to 23 of September 1982 as the Judgement was not ready. On the 23 of September, 1982 the learned trial Judge further reserved judgement till 12 of October, 1982. The Judgement was delivered more than three months after the conclusion of evidence and final addresses, and all reliefs of the plaintiffs were granted. On appeal, the court of Appeal confirmed the decision of the trial court. On further appeal to the Supreme Court, a constitutional point was raised by the

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19 (1987) 3 NWLR (PT.61) 377

> decision thereon and the reasons for the decision and shall be dated and signed or sealed by the court in open court at the time of pronouncing it.[21]

Thus, the point or points for determination before a criminal court is whether, the accused person committed the offence or offences alleged against him, despite his plea.

The decision of the court on the point or points for determination. The court must reach a decision, as to whether the prosecution proved the allegation against the accused beyond reasonable doubt on the one hand, or the prosecution has failed to establish the allegation made against the accused person. The court must decide the point for determination in favour of either the prosecution or the defence. Where the court is in doubt as to whether the point for determination should be decided in favour of the prosecution or the defence, the doubt should be resolved in favour of the defence[22]

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21 See Section 245 of the Criminal Procedure Act.

22 SEE ONAFOWOKAN V. The State (1987) SCNJ 233..

The reason or reasons for the decision of the court. The judgement of the court must state the reasons upon which the decision of the court is based. Failure for a court to evaluate the evidence, amounts to an irregularity, which vitiates the trial. In the case of AIGBE V. THE STATE.[23] The accused persons were charged and convicted of the offences of conspiracy, stealing and forgery. They appealed against their conviction. Learned counsel for the Second accused argued that, the trial Judge failed to consider the evidence adduced in defence of the accused before entering a conviction. The Supreme Court held that, apart from a brief reference to the charge of conspiracy, the trial Judge failed to consider the evidence adduced by the prosecution and the defence raised by the accused. Further more, the point for determination, the decision thereon and the reasons for the decision were not stated. Thus, the trial Judge did not comply with Section 245 of the Criminal Procedure Act (Section 269(1) of the Criminal Procedure Code) and the appeal was therefore allowed.

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23 (1976) 9 - 10 SC 77, See also Onafowokan V. The State, Supra - Note 22.

Similarly, in the case of AKIBU V. OPALEYE,[24] Sowemimo JSC, observed that:-

> "With respect to the learned trial judge in this case, we feel that the case of the expression "I believe and "I do not believe" without really evaluating the evidence of vital witnesses does not stop an appeal court from itself evaluating the evidence and seeing whether there is any justification for the use of such expressions."[25]

The Magistrate or the Judge must sign the judgement at the time of delivering it.

The judgement must bear the date on which it was delivered and signed by the Magistrate or the Judge. If he fails to insert the date in the judgement he will have contravened the statutory requirements. But it is a mere irregularity, where the judgement was signed and dated at the time of pronouncing it. In the case of OBAREKI V.

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24 (1974) IISC 189.

25 Ibid at 203.

THE STATE.[26] The accused was convicted of offences of stealing and forgery. There was no signature and date at the foot of the judgement. But the trial Magistrate signed and dated an order giving conditions of appeal. This order was recorded immediately below the judgement. The accused appealed against conviction on the ground that, the trial Magistrate failed to comply with the provision of the Criminal Procedure Act because, the judgement was not signed and dated. The Court of Appeal held that, it would have been better to sign the judgement and order separately. Nonetheless there had been sufficient compliance with the Criminal Procedure Act because, the order was made at the time of pronouncing it.

Similarly, in the case of OSAYANDE V. THE STATE.[27] The accused persons were convicted of the offences of wilful and unlawful damage to property. They appealed against their conviction on the ground that, the judgement of the trial Magistrate was unsigned and undated at the time of pronouncing it. Their appeal to the High Court Succeeded. The prosecution appealed

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26 (1982)2 NCR 63.

27 Supra Note 10.

successfully to the Court of Appeal. On further appeal by the accused persons to the supreme court, it was held that, since the order was pronounced at the time of delivery of the judgement, the signature and date, appearing at the foot of the order related to the order and the judgement. And further held that, there had been compliance with the statutory provisions. Thus, the appeal was dismissed.

The Judgement of the court must bear the seal of the trial court.

Section 269(2) of the Criminal Procedure Code provides:

> If judgement is a Judgement of conviction it shall specify the offence of which and the Section of the Penal code or other law under which the accused is convicted and the punishment to which he is sentenced.

By this provision, the offence and sections contravened by the accused, must be provided in the judgement, and the conviction and sentence recorded.

Section 269(3) of the Criminal Procedure Code provides:

> If the judgement, is a judgment of acquittal it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

Thus, whether the accused has case or no case to answer, once the judgment was pronounced for acquittal, he should be set free.[28]

5.3 Judgement and Failure of Justice Test.

The term "failure of justice" has not been defined under the Criminal Procedure Code. However, it's meaning has been explained by Hurley C.J. in the case of ABDU DAN SARKIN NOMA V. ZARIA NATIVE AUTHORITY.[29] He stated thus:-

> "It involved two possibilities (i) there may be a failure of justice when there is some doubt whether the trial court, if it had heard the evidence properly would have convicted the accused whom it has actually acquitted. This may be called "Doubt of conviction test," (ii) there may be

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28 See Edet Akpan V. The State(1986)3 NWLR 225.

29 (1963) NNLR 97.

> a failure of justice, when the trial court, if it had heard the evidence properly might have acquitted the accused whom it had actually convicted. This may be called "possibility of acquittal test."

For example, possibility of acquittal was illustrated in the case of MOHAMMED ARAB V. BAUCHI NATIVE AUTHORITY.[30] On trial for theft before Area Court, it was brought out that, the appellant had previous convictions. The record of the trial stated "Because of that, the court charge you with an offence under Section 286 of the Penal Code, punishable under section 287. I sentence you to two years imprisonment because, you are a habitual thief" the High Court allowed the appeal, on the ground that, there was a failure of justice. Read, Ag SPJ, stated thus:-

> "... unfortunately, however the trial court in the appeal now before us did not state clearly what evidence it relied upon in convicting the appellant. There was no direct evidence upon which the court could convict, there were no eye witnesses of the theft. The evidence was

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30 (1965)NNLR 68. See also Ogbodo Ebem V. The State (1990)7NWLR (PT.160) 113, Kajubo V. The State (1988)1NWLR (PT.73) 721, and Eyovokoroma V. State (1979) 6-9SC 3.

> circumstantial, evidence of opportunity to steal and evidence of the appellant being in possession soon after the theft of money similar to that stolen .. on the contrary, it seems to us, and we think it would seem to any reasonable person present at the trial that, the Chief Alkali was influenced by information that the accused was a man of bad character and from that it follows that the appellant was denied a fair trial. Accordingly we think that this appeal should be allowed."

5.4 Effect of Irregularities in Judgement

Section 382 of the Criminal Procedure Code provides:-

> No judgement passed by a court of competent jurisdiction shall be reversed or altered on appeal on account of any error or irregularity, unless the appeal court thinks that a failure of justice has infact been occasioned by such error or irregularity.

It is not every error of law or every slip committed by a Judge in his judgement that justifies the reversal

of a judgement. Therefore, for an appellant to secure the reversal of a judgement he must further establish that, the error of law complained of did infact occasion a miscarriage of justice and or substantially affects the result of the decision.[31]

Failure to allow the accused counsel to address the court is a fundamental irregularity which vitiates the proceedings. In an Indian case of RESHIVRAM.[32] The Magistrate delivered judgement without allowing accused counsel to address the court on behalf of his clients. It was held that, the accused had been prejudice by such material irregularity.

But the Supreme Court of Nigeria, took a different view and held that, such an error is regarded as a mere irregularity, which does not vitiate proceedings of the court. In the case of DONATUS NDU V. THE STATE.[33] The appellant was charged upon an information with the murder of one Jamilatu Shoetan, a girl before High Court Lagos. In addition he also stood trial for

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31 See Ajuwon V. Akanni and Others (1993)9 NWLR (PT.316) 182 at 205. See also Oje V. Babalola 1991)4 NWLR (PT.185) 267 and Ike V. Uboaja (1993)6 NWLR (PT.295) 539 at 556.

32 6 BOM LR 663

33 (1990)7 NWLR(PT.164) 550.

offences of (a) arson (b) with intent to prevent arrest and (c) wilful and unlawful damage to property. At the end of prosecution, after a review of the evidence before him and due consideration of the defences open to the accused along with the applicable laws, the trial judge came to the conclusion that, the prosecution had proved beyond reasonable doubt that the appellant killed the deceased. He accordingly found him guilty of murder and sentenced him to death by hanging. Dissatisfied with the judgement, he appealed to the Court of Appeal on a number of grounds and one of the issues canvassed before the court of appeal, was the question of the refusal of the trial judge to grant the application of the defence counsel for an adjournment to enable him prepare his address. The appellant Counsel contended that, the refusal amounted to a denial of fair hearing to the appellant, which vitiates the proceedings. The Court of Appeal, held that, in this circumstances, it was satisfied the appellant was not prejudiced by the refusal. Dissatisfied he further appealed to Supreme Court. Obaseki, JSC stated thus:-

> ".... It is optional for Counsel to address or not to address court at the conclusion of the hearing of the evidence. If he does address the

> court, he summarises the evidence, emphasises the salient points and makes his submission on them citing legal authorities if any in support. His failure to perform this task does not vitiate the proceedings..."[34]

The Judge cannot base his judgement on extra-judicial information, it is a fundamental irregularity, which vitiates the proceedings. In the Indian case of DEVISGH V. EMPERIOR.[35] Where the evidence on record did not bear out some of the observations of the Magistrate in his judgement, and there was reasonable ground for a suspicion that, the Magistrate incorporated into his judgement what he heard in an inspection. The judgement was set aside on appeal.

Before an accused is sentenced to any punishment, a court shall make it's findings, and this finding is the bases upon which the judgement is written. This means that, a court must give it's reasons why an accused person is found guilty before he could be sentenced to any punishments. Thus, no court will sentence an accused

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34 Ibid at 574.

35 14 CWN XCIX.

person without making findings, and it is only those punishments allowed by statute that may be imposed.

5.5 Sentence

Sentence is a punishment passed by a court of law, after finding an accused guilty of committing an offence. Sentencing also involves, the technique of determining what punishment is appropriate for the person convicted, having regard to the crime of which he has been found guilty. Since the word "sentencing" means a decision making process through which punishment to be inflicted upon a convict is determined,it may be used interchangeably with the word "punishment".

The term "punishment" in its simplest sentence means, the disadvantage or other consequences normally considered unpleasant to the offender by a court having legal authority to impose it. A sensible punishment is one whose infliction on an offender will not only give some satisfaction to its victim, but also prevent him from committing a similar offence, or deter other like minded persons from following his bad example, or make him reform himself and become a better and law abiding citizen.

There is a variety of punishments at the disposal of Magistrate for dealing with convicted persons. However, what punishments a magistrate may actually impose on the offender is usually at his discretion,unless the case is one for which the law has prescribed a mandatory sentence. A magistrate has to exercise his discretion judicially so that, the sentence may not fall outside the limits of fairness.

It is for this reason that the superior courts often give magistrates guidance on how they should go about their task of sentencing. Justice Idoko, gave an excellent piece of such guidance, when he said in the case of ONIYILOKWU V. COMMISSIONER OF POLICE.[36]

> "We need to remind ourselves of the salient factors to call in aid as we administer punishment. One of these is that, before imposing a sentence, a Judge must arrive in his mind at some definite conclusion as to the purpose which it is sought to accomplish by it. For example, is it the reformation of the criminal you are aiming at, or to effect retribution upon him, or to deter others or the criminal from a similar

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36 (1981)2 NCR 49

violation of the law, or is the aim to restrain him physically, so that, no further offence is committed .. sentencing must be administered within the known principles, if it is not to be taken as a sport or as unbridled stage in criminal proceedings. The state of sentencing calls for the interplay of ratiocination, human thought and the appreciation of the pulse of the convict and the public. It is not an occasion where by acting on a hunch, the Judge merely looks at the maximum punishment provided for the offence."[37]

The Penal Code, Criminal Code and Criminal Procedure Act,[38] have enumerated punishments which the law has prescribed a mandatory sentence. For example, Death, Imprisonment, Fine, Forfeiture, Detention, reformatory, canning, Haddi lashing, probation and Borstal Training.

It is a fundamental irregularity, for a court to create new punishment not provided for by statute. In the case of STATE V. HASSAN AUDU.[39] The Supreme Court

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37 Ibid at 56 - 57.

38 See Section 68(1) of the Penal Code, Section 17 of Criminal Code, and Section 366 of Criminal Procedure Act.

39 (1972)1 AII NLR 197.

held that, the High Court of the then North Western State, had no jurisdiction to impose a suspended sentence of imprisonment, since that sentence was not one of the types provided for in the Criminal Code applicable to the State.

In general, the penalties provided for in the Criminal Code and in other statutes creating offences are maximum. For example, Section 17(1) of the Interpretation Act provides that:-

> "Where a punishment in respect of an offence is provided by an enactment, the enactment shall be construed as providing that, the offender shall be liable in pursuance of the enactment, to a punishment not exceeding the punishment so provided..."

Thus, the punishment prescribed for an offence in an enactment represents the maximum that, the court may inflict.

It will not amount to any irregularities, if the trial Judge imposes a lesser sentence. In the case of

OLANIPEKUN V. THE STATE.[40] The appellant was convicted in the High Court of the offence of causing death by dangerous driving contrary to Section 4 of the Federal High Ways Act, 1971. The Section provides that, a person who commits an offence under it "shall be guilty of an offence and liable on conviction to imprisonment for a term of seven years." The trial Judge held that, under the Section he has no discretion to reduce the sentence fixed by the Act, and sentenced the appellant to seven years, imprisonment. On appeal, the Court of Appeal, applying Section 17(1) of the interpretation Act 1964, overruled the trial Judge and held that,the sentence of seven years stated in the Act, was the maximum and not a fixed penalty.

Similarly, the Supreme Court in the case of USEN FRIDAY EKPO V. THE STATE[41] pointed out that,the punishment clause of section 5 of the counterfeit currency (special provisions) Act 1974 which reads "shall be guilty of an offence under this Act and upon conviction thereof shall be liable to imprisonment for 21 years" does not intend a maximum award of twenty one years. In this case,the

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40 (1979)3 LRN 204

41 (1982)6SC 22 at 32.

trial Judge erroneously construed the term of imprisonment of twenty one years as mandatory and sentenced the appellant accordingly.

It should be noted that, there cannot be a sentence, without a conviction. Once a conviction is set-aside,it follows that any sentence passed has no leg to stand on. This is because, a sentence depends on a conviction which is a finding of guilt.[42]

5.6 Limitations on Sentencing Powers

The limit of sentences, means the limits which the courts have power to "inflict punishment."

Generally, sentences are indicated by statutes by stating either the minimum or the maximum punishment, and the Magistrate or the Judge is left with the discretion to impose the appropriate sentence. For example, Section 16 of Magistrates Courts Laws (Cap 89) of 1991, Laws of Kano State Provides as follows:-

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42 See Alhaji Sulaiman Mohammed and Others V. Lasisi Sunusi Olawunmi and Others (1993) 4 NWLR (PT.287) 254 at 278.

(a) Chief Magistrate Grade I, fourteen years or with a fine which may not exceed thirty thousand Naira,

(b) Chief Magistrate Grade II, twelve years or with a fine which may not exceed twenty five thousand Naira,

(c) Senior Magistrate Grade I, ten years or with a fine which may not exceed twenty thousand naira,

(d) Senior Magistrate Grade II, seven years or with a fine which may not exceed fifteen thousand naira,

(e) Magistrate Grade I, five years or with a fine which may not exceed ten thousand naira,

(f) Magistrate Grade II, three years or with a fine which may not exceed five thousand naira, and

(g) Magistrate Grade III, one year or with a fine which may not exceed two thousand naira.

Situations may sometime arise where sentences imposed by the court may be too light or too heavy in comparison to what the statute actually requires.[43]

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43 See Nafi'u Rabiu V. State, Supra Note 91 at 88.

Section 257 (1) (b) of the Criminal Procedure Code Provides:

> "Whenever a court having jurisdiction accept a plea of guilty from a person, and after convicting such person is of the opinion that he ought to receive a punishment different in kind from or more severe than that which such court is empowered to inflict, it may record such opinion and submit the proceeding and send the accused to a court having the necessary powers of punishment or to the High Court.

Thus, if a Magistrate is of the opinion that, an offender deserves a punishment higher than that, which he has the power to award, he can refer such an offender to a higher court, for appropriate punishment.

Magistrates are also empowered to try offences under any law other than the penal code, when such law has expressly conferred jurisdiction on them to try such offences. For example, the Customs and Excise Management Act[44] has increased the sentencing powers of magistrates beyond those provided by the Criminal Procedure Code, and

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44 See Section 145 and 161 of the Customs and Excise Management Act, 1958.

they may now impose a fine up to six times the value of goods involved.

It is important to note that all courts can award any term of imprisonment in default of payment of fine as authorized by Section 74 of the Penal Code, which provides:-

> "If an offence is punishable with fine or with imprisonment and fine the court may direct that in default of payment the offender be imprisoned for any term not exceeding the maximum fixed in the following scale, that is to say - where the fine does exceed one Naira (not exceed seven days), exceeds one naira and does not exceed two naira (fourteen days), exceed two naira and does not exceed twenty naira (one month), exceeds twenty naira and not exceed sixty naira (two months), exceeds sixty naira and not exceed one Hundred naira (four months), exceed one hundred naira and does not exceed two hundred naira (six months), exceeds one Hundred naira and does not exceed four hundred naira (one year), exceed four hundred naira (two years)."

In view of changing economic development. The amount provided under the penal code is inadequate or insignificant compared with the present situations. So there is a need for an amendment of the provision.

However, the term of imprisonment so awarded shall not be in excess for the sentencing powers of the court as provided under section 15 - 18 of the criminal procedure Code. For example, section 15 of the criminal procedure code provide:-

A Chief Magistrate may pass the following sentences:-

(a) Imprisonment for a term not exceeding five years,

(b) fine not exceeding one thousand Naira,

(c) canning,

(d) detention under section 71 of the Penal Code.

It should be noted that, many states have caused a number of amendments to section 15 of the criminal procedure code because of it's inadequacy. For example Katsina and Kano state. Section 15 laws of Katsina state of Nigeria,[45] provides as follows:-

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45 See cap 37 of 1991

(a) A chief magistrate of the first grade, imprisonment for a term not exceeding ten years and fine not exceeding ten thousand naira,

(b) A chief magistrate of second grade, imprisonment for a term of not exceeding eight years and fine not exceeding eight thousand naira,

(C) A senior magistrate of the first grade, imprisonment for a term not exceeding six years and fine not exceeding six thousand naira,

(d) A senior magistrate of the second grade, imprisonment for a term not exceeding five years and a fine not exceeding five thousand naira,

(e) A magistrate of the first grade, imprisonment for a term not exceeding four years and five not exceeding four thousand naira,

(f) A magistrate of the second grade, imprisonment for a term not exceeding three years and a fine not exceeding one thousand naira,

(g) A magistrate of the third grade, imprisonment for a term not exceeding twelve months and fine not exceeding five hundred naira.

No irregularities, where the court pass or the sentence of imprisonment in default of payment of fine. In the

case of AKILA GBILA V. C.O.P.[46] The accused person was convicted by magistrate of the first grade of an offence under Section 107 of Penal Code (Rioting being armed with deadly weapon). He was sentenced to imprisonment for three years, a fine of four hundred naira or two years imprisonment in default and twelve strokes of the cane. The sentence of imprisonment and the term of imprisonment under Section 16(a) of the Criminal Procedure Code, the Magistrate had power to pass a sentence of imprisonment not exceeding three years. There was an appeal against the sentence. The High Court held that the Magistrate had not exceeded his power of sentencing because, imprisonment in default of payment of fine is not a punishment for the offence for which the fine is imposed but a punishment for not paying the fine or means of enforcing payment. The High Court further declared that, the jurisdiction of Magistrate of the first grade to pass a sentence of imprisonment under Section 16(a) of the Criminal Procedure Code and his jurisdiction to award a term of imprisonment in default of payment of a fine under section 22 of the Criminal Procedure Code are distinct and separate.

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46 (1965)NNLR 67. See also Udo Essien V. Commisioner of Police (1996) 5 NWLR (PT.449) 489.

Section 23(1) of the Criminal Procedure Code provides:-

> Where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may in it's discretion impose a fine in lieu of imprisonment.

Thus, the effect of the above section, has empowered the court to inflict fine in lieu of imprisonment.

But the amount of such fine should be within the powers of the court as prescribed by section 15 - 21 of the criminal procedure code. The term of imprisonment for default in payment of the fine so imposed shall not exceed the maximum term of imprisonment as fixed for general application by section 74 of the penal code, whichever is less. If the written law prescribes a minimum term of imprisonment by way of punishment, a fine cannot be imposed in lieu therefore.[47]

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47 See section 23 (2-5) of the Criminal Procedure Code.

Failure of the court to substitute a fine in a serious felonies, will not vitiate proceedings of the trial court.

In the case of OKPON ISANG V. THE STATE.[48] The appellant was charged with murder at the Eket High Court. On the 12th February, 1988 at Akpambiet, the appellant beat his drum summoning the villagers to assemble in the Chief's house. The father of the deceased joined the assembly. After the father returned from the Chief's house with a story that, the appellant beat him. He narrated the incident to his son (the deceased) of the beating, when he returned from work. PW2 and the deceased went to the appellant to ask why their father was beaten by him. Instantly, the appellant brought a dagger and stabbed the deceased with it. PW2 raised an alarm, people came out and carried the deceased to the hospital, where he died the following day. On conclusion of the prosecution, the trial court convicted and sentenced the appellant to twenty years imprisonment. It did not find the appellant guilty of murder. The court found that, the appellant by inflicting six stabs wounds, some of

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48 (1996)9 NWLR(PT.473) 458. See also Asuquo Thomas V. The State (1994) 4 NWLR (PT.337)129.

which were penetrating on the deceased who attacked him with ordinary sticks was an act of savagery. The appellant was dissatisfied and appealed to the Court of Appeal contending among others that, the sentence of 20 years imprisonment without option of fine was not a proper exercise of discretion by the trial court. Per Achike, JCA (as he then was) stated thus:

> "As the trial Judge observed, the killing of the deceased was savagery inflicted in the extreme. In all the circumstances, therefore the trial Judge was obliged to ensure that the punishment fitted the crime. Could the imposition of a fine as canvassed by appellant's counsel, be fair or meet the gravity of the offence, having regard to the circumstances of this case, I would think not. I would hardly be persuaded to reduce the term of years imposed by the trial Judge. A sentence such as a term of twenty years was clearly in mind, intended to serve a particular purpose, namely a deterrent ..."[49]

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49 Ibid at 473.

5.7 Some Procedural Factors Considered in Sentencing

The court in passing a sentence upon an accused person, may within it's discretion consider some of the factors, which are justifiable in mitigating the punishment. The court may even decide to disregard such factors in order to emphasize some other sentencing policy, example-deterrence. But courts usually give considerations to factors like young age, old age, good character and pregnant women in imposing punishments on them. We may have a brief look at these factors:-

a) Young Age

The youth as an offender is a strong mitigating factor and the court normally favours and individualizes measure for offenders under the age of twenty one years provided that the nature of the offence permits it.

There are statutory provisions regulating the kinds of punishment that can be imposed on young offenders for example, Section 27 of the Criminal Procedure Code provides:-

> No sentence of death shall be imposed on a person who is under seventeen years of age or on a pregnant woman.[50]

It is a fundamental irregularity for a person under seventeen years if found of capital offence to be sentenced to death.

A person under the age of fourteen years shall not be ordered to be imprisoned, if he can be suitably dealt with in a less serious way, for example, by being sent to either the Remand Home or Borstal Training Institute or committed to care of his parents.[51]

Failure of the Court, to take into account the age of an accused person, may vitiate the proceedings. In the case of C.O.P V. FRIDAY IDEHIN.[52] D was sentenced to 6 months imprisonment with hard labour or one hundred naira fine for causing harm in the course of a fight. D was a young man who had left the primary school only the previous year. This fact was not disclosed to the trial

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50 See also Section 368(3) of the Criminal Procedure Act.

51 See Section 3 of the Borstal Training Edict.

52 B/SCA/71 (Unreported)

Magistrate, therefore, he did not take it into account. On appeal, the sentence was reduced to only six strokes of the cane. The court observed:-

> "If the Magistrate had taken into account his youth he would have been persuaded that the accused is an adolescent youth who needed correction rather than punishment."

Similarly, in the case of STATE V. MICHEAL OKON.[53] A twelve year old boy had stabbed to death a 24 year old woman, who had thrown his ball two times and had later on began beating him in the evening. He was convicted only of manslaughter on account of grave and sudden provocation. He and his father were ordered to enter into a bond in the sum of four hundred Naira that he will not commit any offence whatsoever for a period of three years.

b) **Old Age**

There is no provision under the Criminal Procedure Code, to reconsider a sentence passed on an old person.

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53 HQ/29C/72 (Unreported).

However, courts take the old age of the offender into account as a factor in mitigation of punishment.

In the case of STATE V. OBAGHA.[54] R aged 40 found V up-rooting his yams and told him to stop it or else he would throw a spear at him. V did not stop. Greatly annoyed, R threw the spear at V and killed him. Considering the fact that R was a very old man, the court convicted him to three years imprisonment without option or fine.

Similarly, in the case of STATE V. OLOWOLAIYEMO.[55] D a hunter aged 70, recklessly shot and killed E (who was on top of a palm tree) mistaking him for a monkey. The court took his age and poor health into consideration to convict him of manslaughter and to sentence him to twelve months imprisonment or a fine of two hundred Naira.

Also in SUDAN GOVERNMENT V. SAEED EL TAYEB ELHAGA.[56] An accused whose age was 80 years old found guilty of

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54 NO.0/32C/71(Unreported).

55 HAD/7C/74(Unreported)

56 (1961) 5LRJR 113

murder, was commuted to imprisonment, after recommendation of extreme old age.

c) **Good Character and Record**

The fact that, the offender is a man of good character may make a substantial difference in the quantum of sentence to be imposed on him. In the case of STATE V. OBI[57] D who had driven his vehicle for fourteen years without causing any accident, was involved in an accident leading to V's death. D was found guilty of causing V's death by dangerous driving. The trial court took into consideration D's record of flawless driving and showed him leniency by sentencing him to pay a fine of three hundred Naira or to undergo twelve months imprisonment with hard labour.

d) **Pregnant Woman**

Section 271(1) of the Criminal Procedure Code provides:

> "Where a woman convicted of an offence punishable with death alleges that she is pregnant or where the court by which a woman is convicted thinks fit so to do, the court shall before sentence is pronounced upon her,

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57 (1967)9 ENLR 152.

> determine the question whether or not she is pregnant."[58]

Thus, where a court convicts a woman to death, and later satisfies itself upon proof that, she is pregnant the court shall mitigate the sentence to imprisonment for life.

e) **First Offence**

The fact that the convict is a first offender is often taken into consideration by courts, particularly in a case, where the first offender is also young. The court may treat him with an individualized measure rather than imposing on him a stiff sentence.

In WILSON EBISUA V. C.O.P.[59] A uprooted an iron stake which V had erected on his own land to block a foot path. A was convicted under Section 81 of the Criminal Code for behaving in a manner likely to cause a breach of the peace and was sentenced to a term of imprisonment without an option of fine. On appeal against conviction (which failed), the High Court took up the question of sentence and observed:-

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58 See Section 368(2) and 376 (1) of the Criminal Procedure Act.

59 LD/16CA/71 (Unreported).

> "There is no appeal on sentence. But to sentence an accused who is a first offender to a term of imprisonment without an option of fine or even a warning for merely uprooting the iron post on another's land is to completely misconstrue the object of criminal punishment."

Because mitigation is in the discretion of the court, the fact that the accused is young, old, of good character, pregnant or a first offender does not mean that punishment may not be severe. If the offence is of a serious kind or is of common occurrence in the area, the court may refuse to give weight to mitigating factors and may emphasize some other sentencing principle, for example, deterrence, and impose a severe sentence.

It has been highlighted in this chapter the irregularities in delivering a judgement and passing a sentence by the courts. It can now be concluded that, any irregularity, error or omission in the course of delivering a judgement or passing a sentence, should not by itself vitiate the proceedings of competent court, unless there is substantial non-compliance with any statutory provision, which occasioned a failure of justice by such an error or omission.

CHAPTER SIX

6.1 Summary and Conclusion

In the foregoing pages attempt has been made to examine the form and effects of irregularities in the criminal procedure code of the Northern States of Nigeria. The purpose of examining these irregularities, are to ensure that, a criminal case should end in a correct verdict, after a fair trial. As the Chief Justice of the former Northern Nigeria, Justice Hurley pointed out in his forward to the text of Criminal Procedure Code in the Northern Nigeria.[1] He said:

> "detailed rules are necessary to make any modern court system run smoothly, but that the end, the goal of these rules are to ensure that the criminal case shall end in a correct verdict after a fair trial."

Basically there are two forms of irregularities, one is the mere irregularity which is trivial and not adverse to the judgement of a court. Without attempting to exhaust all that may constitute mere irregularities, the following are a few examples:-

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[1] Richardson, S.S and William, T.H. (1963) The Criminal Procedure Code of Northern Nigeria. London Sweet and Maxwell Lagos - African Universities Press, p.5

1. The fact that a charge did not disclose all the particulars of an offence, that will not lead to reversal of Judgement on appeal.

2. Where the lower court wrongly admitted evidence or that a technical error is committed in procedure.

3. Failure by the Judge to state that, he was satisfied that the accused understood the charge as interpreted to him in his native language.

4. Where an offence committed by an accused person may be tried under two different provisions or law, the trial court may elect to try the accused person based on any one of the provisions or law.

5. Where police officer arrested the offender without warrant in contravention of the provision of law, which requires warrant to be issued.

6. If the trial court admitted relevant evidence, after search, which is not stated in the search warrant
7. Where the trial judge observations at the locus were not part of the record of proceedings.

8. Where the charge does not contain the exact date of the commission of the offence.

9. If the charge does not contain the name of the owner of property

10. Where offences of the same nature or identical was charged together in one count only.

11. An omission in not stating the exact title to the enactment contravened.

12. When the trial Judge delivers Judgement in the absence of the accused person.

13. Where the Judgement was signed and dated at the time of pronouncing it.

14. Where the trial judge refused the accused counsel to address the court at the conclusion of the hearing of the evidence.

15. If a Judge imposes a lesser sentence than that fixed by the Act.

Secondly fundamental irregularity is considered so serious and is adverse to the Judgement of court to make it void. It is difficult to set out all the fundamental irregularities that would make a trial void, however, it will not be out of place if an attempt is made without in

any way exhausting the whole list. The following will constitute fundamental irregularities:-

1. When a trial is conducted in a manner different from that prescribed by the rule of procedure or statutory procedure.

2. Where the record of proceedings does not show that, the charge was read to the appellant or it was not explained to him.

3. If a court denied the accused to have assistance of an interpreter, if he does not understand the language used in court.

4. Where a court not being empowered by law, tries an offender.

5. If a Judge has a personal or pecuniary interest and adjudicate on a matter before him.

6. For a court to deny an accused person an opportunity to present his defence.

7. Where the trial Judge shifted the burden of proving innocence on the accused person.

8. If the trial Judge denied an accused person enough time to arrange all evidence for his defence.

9. Where a trial court allow an accused person to be undefended by a counsel in a capital offence or in a situation, where a court refused a counsel to an accused person; or where the trial Judge refused to allow the defence counsel to cross-examine the respondent.

10. Where the trial court put the accused in the witness box and compelling him to give evidence in his own trial.

11. Where an accused person convicted of an offence under a non-written law.

12. If a conviction is secured in a situation, where a police officer compelled an accused person to make a confessional statement.

13. Refusal by the trial Judge to allow cross-examination of witnesses, whose evidence contradicts accused person's version.

14. Failure of the trial Judge to call the accused and witnesses to testify on oath in the court, on what transpired at the locus.

15. Where a conviction is secured based on a confession obtained by means of threat, promise or inducement.

16. Where distinct offences was combined in one head of charge.

17. Where the trial judge delivers oral judgement.

18. In a situation, where the trial Judge does not state the reasons or evaluate the evidence upon which the decision of the court is based.

19. Where the trial Judge create new punishment not provided for by statute.

20. If a trial Judge sentence a person under seventeen years if found of capital offence to death.

It should be noted that, whether a mistake or error in a criminal proceeding would result in setting aside a Judgement will depend on, if it occasions a failure of Justice. The sum total is that a trial that occasions a failure of Justice must be set aside on appeal.

A distinction was made, as to when an error or mistake vitiates the proceedings of a lower court. Iguh, JSC in the case of GWANTO V. STATE[2] stated thus:-

> "It is not every error of law or every slip committed by a Judge in his Judgement that justifies the reversal of a Judgement. Therefore, for an appellant to secure the reversal of a Judgement he must further establish that error of law complained of did in fact occasion a miscarriage of Justice and or substantially affect the result of the decision. An error in law which has occasion no miscarriage of Justice is immaterial and will not affect the final decision of a court. Similarly for a misdirection to be fatal it must have occasioned a substantial miscarriage of Justice. The mistake must have affected or influenced the decision appealed against before it can result in the reversal of the decision."

It is note worthy that, the appeal courts have not explained what constitutes "failure of Justice" or

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2 (1983) 1SCNLR 142 at 152 See also Ajuwon V. Akanni and Others (1993) 9 NWLR (PT.316) 182 at 205 and Ike V. Ugboaja (1993) 6NWLR (PT.295) 539 at 556.

"Prejudice" within the contents of criminal procedure code. Iguh, JSC stated thus:-

> "... For an appellant to secure the reversal of a Judgement he must further establish that the error of law complained did in fact occasion a failure of Justice or substantially affect the result of the decision."[3]

From the foregoing decision of learned Justice, it is explicit clear that, for an appellant to succeed in reversal of Judgement, he must further explain to the appeal court that, the decision of a lower court did in fact occasioned a failure of Justice. The provisions of the code that, attempted to define the phrase are not clear enough.[4] However, Black's law Dictionary had defined, Failure of Justice as:-

> "The defect of a particular right, or the failure of reparation for a particular wrong, from the lack or inadequacy of a legal remedy for the enforcement of the one or the redress of the other..."[5]

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3 See Salisu Mohammed Gwanto V. State Supra Note 2.

4 See section 288 and 382 of the Criminal Procedure Code

5 Henry, C.B. Supra Note 7, at 595.

The constitution[6] made provision for "fair hearing"without defining the phrase or to what constitute a fair hearing. However, the Supreme Court has of recent revisited it's earlier definition of the term and stated that:-

> "The term "fair hearing"has been judicially interpreted to involve situations where, whether having regard to all the circumstances of a case, the hearing may be said to have been conducted in such a manner that an impartial observer will conclude that the tribunal was fair to all the parties to the proceedings. It is said to mean a trial conducted according to all the legal rules formulated to ensure that Justice is done to all the parties to a cause or matter."[7]

An arrest by the police officers may be made with or without warrant under the Criminal Procedure Code, Criminal Procedure Act and Police Act,[8] in certain circumstances and also it provides a procedure for arresting an individual. Any arrest which has not conformed with the rules and

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6 See 1979 Constitution

7 See Military Governor of Imo State V. Nwauwa (1997) 2NWLR (PT.490) 675-SC

8 See Section 56 and 26 of Criminal Procedure Code, Section 10 of Criminal Procedure Act and Section 20 of the Police Act.

regulations which empower a police officer, private person or Justice of the peace, may amount to an irregularity, which will amount to an infringement of accused fundamental rights. In a situation where an accused was unlawfully deprived of his liberty, can sue for false imprisonment and the remedy available to him is for compensation and public apology.[9] In some cases, there seems to be non-compliance by the Police to pay compensation or refusing to tender apology. Where this happen, the police may be charged for contempt of court order. It is note worthy that, the provision[10] empower the police to arrest or detain any person on a "reasonable suspicion." Moreover, if such detention becomes necessary, the Police is expected to take such a person to court within a period of one day or at most two days.[11] Therefore the detention by the police of any person on a reasonable suspicion or for a period exceeding one or two days as the case may be is unconstitutional. There are often strong indications that arrested person are kept in Police custody for several days or even weeks or months before they are taken to court.[12] The criminal procedure code, provides in section 26 - 30 for the persons who can affect an arrest on a suspected persons, without providing as to how and manner an arrest can be effected. Therefore

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9 See Section 32(6) of the 1979 Constitution.

10 See Section 26(c) of Criminal Procedure Code.

11 See Section 32(5) of the 1979 Constitution

12 See John Falade V. A.G. of Lagos State (1981) 2 NCLR 771.

in the absence of such provision in the criminal procedure code, it is desirable to have it amended, so as to be in consonance with the provision of criminal procedure Act. In making an arrest the police officers or any other person may actually touch or confine the body of the person arrested.[13]

The effect of non-compliance with the above provision will not vitiate the proceedings of the court.[14] However, an accused been deprived of his liberty or unlawfully arrested can sue for false imprisonment, for an award of compensation and public apology.[15]

The police powers of search are contained in the Criminal procedure Code, Criminal Procedure Act, and the Police Act.[16] A police officer searching a person shall place in safe custody such articles, other than necessary wearing apparel, as he thinks fit, and shall make a list of the same, and shall permit the arrested person to retain all articles not so placed in safe custody, and when arrested person is a woman, the search shall not be made except by a woman. Instances abound where some magistrates and Area Court Judges sign blank search warrant to the police officer, amount to abuse of Judicial process, where such can

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13 See Section 3 of the Criminal Procedure Act.

14 See Section 382 of the Criminal Procedure Code.

15 See Supra Note 9.

16 See Section 44 of Criminal Procedure Code, S.6 of Criminal Procedure Act and S.25 of the Police Act 1967.

be established liability will solely lay on the issuing magistrate or Area Court Judge. S.377(1) of Criminal Procedure Code not withstanding, for the section protects actions of Judges and Magistrates who exceeds their Jurisdiction in good faith believing to have jurisdiction so to do. Therefore the issuing magistrate or Area Court Judge should be held personally responsible for the resulting consequences. For example, the violation of citizen right to private and family life and the possible illegal removal of any items as a result of such exercise.

The proper procedure, in production of accused and evidence before the court, must be complied with. The attendance of an offender in court is ensured either by summons or warrant,[17] and the productions of evidence, may involve real or material evidence or the production of confessional statement of an accused person, by the police officer. What is essential is that, the court before admitting the evidence, should be satisfied that the statement was really made voluntarily and was not prompted by any promise, threat or by actual violence or inducement,[18] and also police are advised to record confessional statement in the language it was made so that when it is read out to the maker in the language made, he would be able to recognise it's tenor. A considerable amount of time is

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17 See Section 154(1) of the Criminal Procedure Code.

18 See Section 28 of the Evidence Act, Cap 112, Laws of Federation of Nigeria, 1990.

being spent in eliciting evidence before the court. It is noteworthy that, where the accused person objects the admissibility of confessional statement, on the ground that it was made involuntarily, the court has a duty to try the issue then and rule on whether to admit or reject the statement. This is what is called Trial within Trial. The purpose is therefore to determine whether the confessional statement was made voluntarily or not. It is worth noting that the practice and procedure to be followed during trial within trial is now settled in the sense that the constitutional right to fair hearing and the principle of the innocence of the accused until proved guilty, are ensured, both by statute and case law. However, trials could be speeded up, if the following rules were substituted:-

(i) A witness may be led to the extent of his statement to the police, if any, which is contained in the case diary, and

(ii) A witness shall have the right to refresh his memory, from his statement, if any, in the case dairy.

Whenever a court is satisfied that, the evidence adduced has established a prima-facie case against the accused

person, a charge will be framed.[19] The object of the inquiry is therefore to find out whether there is sufficient evidence to justify the trial of the accused person. Thus, from the above provision, the magistrate is constituting both as trial Judge and also an investigator. It is suggested that, the preliminary inquiry to be abolished because the entire system clearly violate the provisions of fair hearing under section 33 of the 1979 constitution,[20] and the legal practitioners employed by the state ministries of Justice are to be vested with authority to prepare and sign the charge sheets in magistrate courts. All charge framed must contain particulars to time, place and person whom an offence is committed.[21] What is always important to note is that, an omission or error in stating "particulars"or ingredients of the offence shall not by itself vitiate the proceedings.[22]

After the presentation of the case by the prosecution and by the defence and addresses have been delivered by counsel to both parties, the court delivers it's judgement. A magistrate in the Northern State must reduce his Judgement into writing before he delivers it, and if he delivers oral

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19 See Section 160(1) of the Criminal Procedure Code.

20 See Section 35 of the 1989 Constitution.

21 See Section 202 of the Criminal Procedure Code.

22 See Ogbodu V. the State (1987) 2NWLR (PT.54) 20.

judgement, such a decision is null and void.[23] The Judgement of the court must also state the reasons upon which the decision of the court is based. Failure for a court to evaluate the evidence, amounts to an irregularity, which vitiates the trial. Before an accused is sentenced to any punishment, a court shall make it's findings and this finding is the bases upon which the judgement is written. The Penal Code, Criminal Code and Criminal Procedure Act,[24] have enumerated punishments which the law has prescribed a mandatory sentence. For example, Death, Imprisonment, Fine, Forfeiture, Detention, Probation and Borstal Training. Therefore it is a fundamental irregularity for a court to create new punishment not provided for by statute.[25] All persons engaged in the administration of Justice. For instance, Judges, Magistrates, Registrars, Court Clerks and Investigating Police officers must be given regular training by means of refresher courses and seminars, and those presiding over the area courts should be holders of at least Diploma in Law. Degree holders should be encouraged to take appointment in Area Courts. The seminars is an opportunity to deliberate on the irregularities which occasion a failure of Justice.

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23 See Section 268(1) of the CPC

24 See Section 68(1) of the Penal Code, Section 17 of Criminal Code and Section 366 of Criminal Procedure Act.

25 See State V. Hassan Audu Supra at p.240.

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